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# In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


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# UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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*v.*

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, in her official capacity as Attorney General of the United States, DEFENDANTS-APPELLANTS

and

THE NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, DEFENDANT

CONSUMER FEDERATION OF AMERICA; VIRGINIA CITIZENS CONSUMER COUNCIL; NEWSPAPER ASSOCIATION OF AMERICA; VIRGINIA PRESS ASSOCIATION;

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; METS FANS UNITED/VIRGINIA CONSUMERS FOR CABLE CHOICE, ET AL.; CITIZENS FOR A SOUND ECONOMY FOUNDATION; THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL; THE COMPETITIVE ENTERPRISE INSTITUTE; THE UNITED STATES TELEPHONE ASSOCIATION; AMERITECH CORPORATION; BELLSOUTH CORPORATION; GTE SERVICE CORPORATION, on behalf of its affiliated domestic operating companies; NYNEX CORPORATION; PACIFIC TELESIS GROUP; ROCHESTER TELEPHONE CORPORATION; SOUTHWESTERN BELL CORPORATION; US WEST INCORPORATED; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, FIBER OPTICS DIVISION, AMICI CURIAE

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No. 93-2341

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA; BELL ATLANTIC CORPORATION; BELL ATLANTIC VIDEO SERVICES COMPANY; CHESAPEAKE AND POTOMAC TELEPHONE COMPANY; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA; THE DIAMOND STATE TELEPHONE COMPANY; THE BELL TELEPHONE COMPANY OF PENNSYLVANIA; NEW JERSEY BELL TELEPHONE COMPANY, PLAINTIFFS-APPELLEES

*v.*

THE NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, DEFENDANT-APPELLANT

and



UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, in her official capacity as Attorney General of the United States, DEFENDANTS

CONSUMER FEDERATION OF AMERICA; VIRGINIA CITIZENS CONSUMER COUNCIL; NEWSPAPER ASSOCIATION OF AMERICA; VIRGINIA PRESS ASSOCIATION; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; METS FANS UNITED/VIRGINIA CONSUMERS FOR CABLE CHOICE, ET AL.; CITIZENS FOR A SOUND ECONOMY FOUNDATION; THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL; THE COMPETITIVE ENTERPRISE INSTITUTE; THE UNITED STATES TELEPHONE ASSOCIATION; AMERITECH CORPORATION; BELLSOUTH CORPORATION; GTE SERVICE CORPORATION, on behalf of its affiliated domestic operating companies; NYNEX CORPORATION; PACIFIC TELESIS GROUP; ROCHESTER TELEPHONE CORPORATION; SOUTHWESTERN BELL CORPORATION; US WEST INCORPORATED; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, FIBER OPTICS DIVISION, AMICI CURIAE

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Appeals from the United States District Court
for the Eastern District of Virginia

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Argued: February 7, 1994

Decided: November 21, 1994

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Before RUSSELL and MICHAEL, Circuit Judges, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

## OPINION

RUSSELL, Circuit Judge:

At issue in this case is the constitutionality of 47 U.S.C. § 533(b), which provides, in pertinent part:

> (1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

47 U.S.C. § 533(b)(1), (2).[1] This provision, enacted as part of the Cable Communications Policy Act of



1984 (the "1984 Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 521 *et seq.*), essentially prohibits local telephone companies from offering, with editorial control, cable television services to their common carrier subscribers.[2] In a thorough opinion, the district court found the statute to violate the First Amendment. *Chesapeake & Potomac Tel. Co. v. United States* ("*C&P*"), 830 F. Supp. 909 (E.D. Va. 1993).[3] For the reasons stated herein, we affirm.

## I.

The facts and background underlying this case, which the parties do not dispute, are presented fully

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[1] Paragraph (3) provides that Section 533(b) does not apply to a common carrier to the extent that the common carrier provides service to "any rural area." Paragraph (4) confers upon the FCC the discretionary authority to grant waivers from paragraphs (1) and (2) where the FCC determines that local common carrier subscribers could not obtain cable services other than by means of the common carrier. Neither of these paragraphs is implicated here.

[2] *See infra* Section III.

[3] The federal district court in *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), reached a similar conclusion; that decision is on appeal to the United States Court of Appeals for the Ninth Circuit. Other similar litigations are pending in other district courts. *See Ameritech Corp. v. United States*, No. 93 C 6642, 1994 WL 142864, slip op. (N.D. Ill. Apr. 18, 1994) (addressing motion to transfer venue in case challenging Section 533(b) to the Eastern District of Michigan where another action challenging Section 533(b), *Ameritech Corp. v. United States*, No. 93 CV 74617, is pending); *NYNEX Corp. v. FCC*, 153 F.R.D.1 (D. Me. 1994) (permitting regional cable television association to intervene in action challenging Section 533(b)).

in the opinion of the district court. We summarize them here.

Chesapeake and Potomac Telephone Company of Virginia ("C&P") applied for a cable franchise from the City of Alexandria ("City"). It is undisputed that the City denied this application solely upon its belief that any grant of such of a franchise would violate 47 U.S.C. § 533(b). Thereafter, C&P and Bell Atlantic Video Systems, both wholly-owned subsidiaries of Bell Atlantic Corporation, brought suit in federal district court in Virginia against the United States, the Federal Communications Commission ("FCC") and the Attorney General (collectively the "Government defendants") seeking to invalidate Section 533(b) as itself violative of the First Amendment and seeking to enjoin its enforcement.[4] Subsequently, the National Cable Television Association ("NCTA") sought, and was granted, permission to intervene as a defendant. Cross-motions for summary judgment were filed. Ultimately, the district court granted plaintiffs' motion for summary judgment. It declared 47 U.S.C. § 533(b) unconstitutional both facially and as applied to plaintiffs and enjoined the Government defendants from enforcing the provision.[5]

[4] That the statute, by its terms, would apply to bar C&P from operating a cable system in Alexandria is undisputed. C&P provides common carrier service in Alexandria, and so plaintiffs could not operate a cable system servicing customers in Alexandria without running afoul of Section 533(b)(1).

[5] In its original Order, dated August 24, 1993, the district court declared unconstitutional "47 U.S.C. § 533." By Amended Final Order dated October 7, 1993, the district court amended its Order limiting the invalidation to Section 533*(b)*.



The Government defendants and the NCTA appeal the district court's judgment.

## II.

Before the specific contentions of the parties are addressed, a discussion, albeit truncated, of the history of regulation in this area will be helpful.

Although cable television has its origins in the 1940's, *see Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2451 (1994), only by the late 1960's was the industry on the verge of true expansion, *see C&P*, 830 F. Supp. at 915. In those days, it was commonplace for companies to hang the coaxial cables through which they provided cable service or, as it was then called, community antenna television service ("CATV"), from utility poles. The FCC was concerned that local telephone companies, as monopolists and owners of these poles, would be in a position to obstruct or delay companies which were unaffiliated with the telephone companies, and who wished to provide cable television services, from entering that market. The FCC's initial response to this concern consisted solely of a requirement that a telephone company obtain certification, pursuant to 47 U.S.C. § 214,[6] prior to constructing, acquiring or

[6] That measure provides:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained

operating any video transmission facilities. *See General Tel. Co. of Cal.*, 13 F.C.C.2d 448 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The FCC found that anti-competitive practices by telephone companies against unaffiliated cable companies nevertheless persisted and, so, in 1970, the FCC promulgated a rule which barred telephone companies from providing cable service in their local telephone service areas, except upon issuance of a waiver by the FCC. That rule, then found at 47 C.F.R. § 64.601, provided, in pertinent part:

> (a) No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall directly or indirectly through an affiliate owned or controlled by or under common control with said telephone communications common carrier, engage in the furnishing of CATV to the viewing public in its telephone service area.
>
> (b) No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall provide channels of communications or pole line, conduit space, or other rental arrangements, to any entity which is directly or indirectly owned, operated, or controlled by such telephone communications common carrier, where such facilities or arrangements are to be used for or in connection with the provision of CATV service to the viewing public in the service area of the said telephone common carrier.

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from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . . .

47 U.S.C. § 214(a).



*Applications of Telephone Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems; Final Report and Order*, 21 F.C.C.2d 307, Appendix A, at 331, *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). (The rule, modified only so as to conform to Section 533 (b), as discussed *infra*, is today found at 47 C.F.R. § 63.54.) In enacting the rule, the FCC specifically noted that concentration of control of communications media was undesirable. *Id.* ¶ 56. The FCC identified two ways in which local telephone companies, absent regulation, were likely to dominate the cable industry. First, the telephone companies could deny unaffiliated cable companies access, or charge excessive prices for access, to telephone company poles. *Id.* ¶¶ 13(b), 46. (This is called "pole-access discrimination.") Second, the telephone companies with cable affiliates could subsidize these cable affiliates with revenue obtained from telephone company operations. *Id.* ¶ 13(a). (This is called "cross-subsidization.")

In 1978, Congress passed the Pole Attachment Act. Pub. L. No. 95-234, 92 Stat. 35, which, in pertinent part, instructed the FCC to "regulate the rates, terms, and conditions for pole attachments," 47 U.S.C. § 224(b)(1). (The FCC subsequently promulgated regulations, *see* 47 C.F.R., Part 1, Subpart J, governing the rates, terms, and conditions for pole attachments.) While the Pole Attachment Act elimi-

nates the possibility of discriminatory pricing for access to poles, it does not mandate access to poles and therefore does not address all the concerns purportedly addressed by the FCC rule and the subsequent enactment of Section 533(b).

In 1981, the FCC reconsidered the need for its cross-ownership rule. It concluded that the rule, at the time, remained a necessity, FCC Office of Plans and Policy, *FCC Policy on Cable Ownership: A Staff Report* 176 (1981), but acknowledged that it might not be necessary to retain the rule in perpetuity, *id.* at 177-78.

In 1984, Congress enacted Section 533, captioned "Ownership restrictions," as part of the 1984 Cable Act. The new statutory provision was adopted, with few changes, from the FCC rule. Importantly, however, and without explanation in the legislative history, Congress drafted Section 533(b) to prohibit not the furnishing of "CATV" service as did the extant FCC rule but, instead, the provision of "video programming." The FCC subsequently amended its regulation to reflect the enactment of Section 533(b).

Section 533(b)'s telephone-cable cross-ownership bar[7] was accompanied by Section 533(a)'s broad-

[7] Appellees argue that Section 533(b) is not properly termed a cross-ownership bar. Rather, they argue, it is a statute that plainly and simply bans speech. It is clear, however, that, although the wording of Section 533(b) does not explicitly bar cross-ownership, the effect of Section 533(b) is to prevent a common carrier from owning or affiliating with a cable company operating in its common carrier service area. *See infra* Section III; *see also National Cable Television Ass'n v. FCC*, 914 F.2d 285, 286 (D.C. Cir. 1990) (referring to Section 533(b) as a "cross-ownership" rule). To the extent that appellees contend that the moniker 'cross-ownership rule' is



casting-cable cross-ownership bar.[8] Subsection (c) grants the FCC authority to promulgate other media-related cross-ownership bars applicable to "ownership or control of a [local] cable system." Congress indicated, within the body of the statute, that it intended the 1984 Cable Act to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), and to "promote competition in cable communications," *id.* § 521(6). A House Report recited that the congressional aim in enacting Section 533 (as a whole) was "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692. The report further explains that Congress' "intent [in enacting Section 533(b) was] to codify current FCC rules concerning the provision of video programming over cable systems by common carriers." *Id.* at 56, *reprinted in* 1984 U.S.C.C.A.N. at 4693. The 1984 Cable Act and its legislative history are otherwise silent as to the purpose or goals of Section 533(b).

inappropriate because Section 533(b) prohibits a telephone company from using its existing technology to transmit its own video programming, such argument is merely semantic.

[8] The cable-broadcasting cross-ownership bar, now found at 47 U.S.C. § 533(a)(1), provides:

> It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

In 1987 and 1988, the FCC again undertook a review of whether repeal of the telephone-cable cross-ownership bar would be appropriate. Although it specifically found the bar to be constitutional under intermediate scrutiny, *Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58*, 3 F.C.C. Rcd. 5849 ¶¶ 76-77 (1988) (Further Notice of Inquiry and Notice of Proposed Rulemaking), the FCC tentatively concluded that repeal of the rule in favor of less restrictive alternatives might be appropriate, *see id.* ¶¶ 78-80. In 1992, the Commission again voted in favor of repeal, provided that "appropriate safeguards" were imposed. *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 F.C.C. Rcd. 5781 ¶ 135 (1992) (Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking) ("*Video Dialtone Order*"). Similar positions have been reached by other government agencies, including the Justice Department's Antitrust Division. *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, at 44 (1992) (Reply Comments of the U.S. Dep't of Justice). To date, however, despite numerous proposals to that effect, Congress has yet to repeal Section 533(b).

III.

Much of the disagreement in this case arises from one issue: the proper characterization of Section 533(b). Section 533(b) bars telephone companies from directly or, via affiliates controlled by the companies, indirectly distributing "video programming" to customers of its common carrier services. By regulation, the FCC defines "control" and "affiliate" as



follows: "[T]he terms 'control' and 'affiliate' bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship." 47 C.F.R. § 63.54(c). Further: "Only those ownership interests which amount to 5 percent or more shall be considered a cognizable ownership 'affiliation' for purposes of this section." *Id.* § 63.54(e)(1).

Paragraph (1) of 47 U.S.C. § 533(b) prohibits (as, similarly, does subsection (b) of 47 C.F.R. § 63.54, the FCC rule underlying Section 533(b)) common carriers from

> provid[ing] channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

As a corollary, however, it seems that the telephone company can legally "provide channels of communications or pole line conduit space" to an *un*affiliated cable operator to use in the provision of video programming in the telephone company's common carrier service area. It has thus been held that, consistent with the FCC rule underlying Section 533(b), "a telephone company can offer pole space to a cable operator that is unaffiliated" with it. *Northwestern Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1209 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1035 (1990). It has further been held "that a telephone company may

construct, maintain and own channel distribution facilities and use them to transmit television signals for *independent* cable operators without running afoul of the [FCC]'s cross-ownership rules." *Id.* (footnote omitted) (emphasis in original); *see* 47 C.F.R. § 63.57.[9] Such involvement by a telephone company in the provision of cable television is construed to fall within the "carrier-user" exception contained in 47 C.F.R. § 63.54(c). Of course, in order to function in its "common carrier" capacity and, thereby, to qualify for the "carrier-user" exception, the telephone company may not engage in "unjust or unreasonable discrimination," 47 U.S.C. § 202, including basing its decision as to whether to provide channel distribution facilities to a particular cable operator on the basis of the content of the speech that operator will convey, *see id.* A similar result, of course, obtains under Section 533(b), under which the FCC regulations lie. *National Cable Television Ass'n v. FCC*, 914 F.2d 285, 289 (D.C. Cir. 1990).

From the foregoing, we may distill the following essential understanding of Section 533(b). Section 533(b) allows telephone companies to transmit, without any editorial control, the video programming of

[9] Section 63.57 provides, in pertinent part:

> Applicants by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems shall include a showing . . . that the independent cable system proposed to be served had available, at its option, and within the limitations of technical feasibility, pole attachment rights (or conduit space, as the case may be) at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator.



unaffiliated cable operators.[10] Further, while telephone companies can "create" video programming, they cannot transmit directly their own programming to their local subscribers. While appellants correctly note that the telephone companies *may* legally arrange to have their video programming transmitted to this audience by means of unaffiliated cable or broadcast television operators or by purchasing local broadcast television stations,[11] this argument ignores

[10] Appellees dispute that Section 533(b) allows for such activity on the part of the telephone companies, arguing that such activity is barred by Section 533(b)(1)'s prohibition against "direct[] or indirect[]" telephone company "provi-[sion of] video programming" to common carrier subscribers. As discussed in the text, the language of Section 533(b)(2) seems inconsistent with this position; moreover, the courts and the FCC have taken the opposite view. We need not definitively decide here whether Section 533(b) in fact allows telephone companies to provide cable transport services to unaffiliated cable operators; instead, we assume that it does and nonetheless conclude that the provision is unconstitutional. This is because, although, from an economic perspective, an interpretation of Section 533(b) which allows for telephone company provision of cable transport services without editorial control is more favorable to the telephone companies, from the perspective of the First Amendment, the distinction is irrelevant. The First Amendment's problem with Section 533(b) is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, *with editorial control*, of cable television services. Under either interpretation of Section 533(b), the provision retains its impairing effect on protected speech.

[11] Some appellants also suggest, although appellees note that the varous appellants' views have been inconsistent, that Section 533(b) would not bar a telephone company from owning and operating a broadcast station in its area of common carrier service. This is not clear from the language of Sec-

the practical fact that this ability turns on the whim of local broadcasters and cable operators. In short, while telephone companies *may* legally arrange to have their own video programming transmitted to their local audiences, this does not mean that they *can*, in all cases, achieve this goal. Thus, unlike other video programmers, the telephone companies *cannot guarantee* that their programming will reach this audience. To this extent, then, Section 533(b) regulates the telephone companies' ability to compete in the video programming market, for a telephone company which chooses to create its own video programming cannot, unlike its competitors, ensure, if it chooses, that its programming will reach any particular audience.

We turn to an examination of how Section 533(b)'s function fulfills the goals which it was enacted to serve. The need for regulation of the telephone companies' entry into the cable medium arises from the peculiar technological characteristics of the cable medium.[12] The Supreme Court explained in *Turner*:

tion 533(b), which prohibits "any common carrier . . . [from] provid[ing] video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier," without limiting the prohibited means by which video programming can be carried to the use of the common carrier network. This issue is not today before us and is not essential to our inquiry herein; we assume, for purposes of our analysis herein, that the telephone companies can, consistent with Section 533(b), own broadcast television stations within their respective common carrier service areas.

[12] "[T]he unique physical characteristics of cable transmission should [not] be ignored when determining the constitutionality of regulations affecting cable speech." *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2457.



> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.

114 S. Ct. at 2466. The telephone companies' common carrier networks are the only electronic means of access to American homes and businesses other than existing coaxial cable wiring networks used by cable operators. Recently, the possibility of transmitting cable programming over these common carrier networks has become a reality. Thus, the peculiar positioning of the local telephone companies makes them natural competitors of the cable operators.

Appellants advance two justifications for Section 533(b): preventing the telephone companies from engaging in monopolistic practices against the cable industry and maintaining diversity in ownership of communications outlets. Although, at first glance, the section appears to inhibit competition and undermine diversity by effectively keeping the telephone companies, the natural technological predators of the cable companies, largely out of the cable business, thereby allowing cable companies to keep their mo-

nopolies,[13] the reasoning behind Section 533(b) is that, were telephone companies allowed to compete directly against cable companies, the telephone companies, by virtue of their monopoly position, could and would drive the cable companies out of business, resulting in telephone companies serving as sole "gatekeeper[s]," 114 S. Ct. at 2466, of the means of electronic access to homes and businesses. *See National Cable Television Ass'n*, 914 F.2d at 287 ("It is clear enough from Congress's explicit adoption of the Commission's ban on cross ownership that the policy of this subsection is to promote competition by curtailing the opportunities telephone companies would otherwise have to take advantage of their monopoly control of the conduits and telephone poles that are required for the transmission of video programs to cable subscribers."). Worse, as explained more fully below, the telephone companies could then use this awesome power to exert monopoly control over the market for video programming products, the so-called video programming market.

IV.

"Video programming" comprises much of the programming provided by cable television companies. It is clear that the provision of cable television service is a form of "speech" protected by the First Amend-

[13] Of course, telephone companies may own cable companies outside of their common carrier service areas, but this does not allow for competition: those telephone company-owned cable companies would presumably still enjoy monopolies since the local telephone company could not use its existing network of wiring to provide, as it easily could, video programming.



ment.[14] *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2456; *Leathers v. Medlock*, 499 U.S. 439 (1991). Because Section 533(b) impairs the telephone companies' ability to engage in a form of protected speech, we must determine whether Congress' enactment of Section 533(b) violated the First Amendment.

A.

A court, in evaluating whether a regulation of speech runs afoul of the First Amendment, must subject the regulation to a degree of scrutiny determined by the particular circumstances presented. Generally, a regulation that imposes a differential burden on certain speech because of the "content" of that speech alleged to infringe upon protected speech is unconstitutional unless it can survive strict scrutiny. *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2459. By contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Id.* It is under this standard that the government may "impose reasonable restrictions on the time, place, or manner of protected speech" (so-called "time, place and manner restrictions"), provided that the restrictions are content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989). Last, in rare cases, the Supreme Court has held that the First Amendment requires that certain regulations of speech pass only minimal scrutiny. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 397-400 (1969).

We consider first the applicability of minimal scrutiny. Concluding that standard to be inapplicable

[14] The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I.

here, we then turn to whether we must apply strict, or merely intermediate, scrutiny.

1.

The government and the NCTA raise several related arguments in favor of the application of minimal scrutiny. None is convincing.

a.

The Supreme Court has generally limited application of minimal scrutiny to First Amendment cases to cases involving regulation of the broadcast media. *See Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2456. The Supreme Court has repeatedly emphasized that the reason that regulations of broadcast media need pass only minimal scrutiny is the fact, unique to the broadcast media, that the number of broadcast stations (television and radio) usable productively by society is limited by physical considerations. *See, e.g., id.* at 2456-57; *Red Lion Broadcasting Co.*, 395 U.S. at 397-400.

Appellants suggest that application of minimal scrutiny should extend to regulations governing cable television, arguing that, just as the First Amendment requires only that broadcast television be subjected to limited review because of the physical scarcity of broadcast frequencies, the scarcity of cable systems warrants similar review to regulation of cable television. In short, appellants argue that, although it is undisputed that there is no physical limitation on the number of cable systems that can be constructed or on the number of cable channels that a cable system can support,[16] it is, as a matter of economics, impractical for there to be more than one cable system in any given municipality.

[16] Although the physical capacity of particular, usually older, cable systems may be limited by technological inferiority, nevertheless, the medium as a whole has no practical limits.



Apart from the question of whether the premise underlying this argument is true, *see Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir.) (invalidating, under the First Amendment, a Los Angeles restriction limiting cable service in particular areas of that city to one operator), *cert. denied*, 114 S. Ct. 2738 (1994); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985) ("[T]he tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any "natural" economic phenomenon."), *cert. denied*, 476 U.S. 1169 (1986), the Supreme Court squarely addressed and rejected this argument in its recent opinion in *Turner Broadcasting System, Inc.*, 114 S. Ct. at 2457-58. We accordingly reject it here.

b.

Appellants' next argument in favor of minimal scrutiny relies upon the Supreme Court's opinion in *FCC v. National Citizens Commission for Broadcasting ("NCCB")*, 436 U.S. 775 (1978). At issue in *NCCB* was the constitutionality of a regulation promulgated by the FCC, under which, with few exceptions, a newspaper publisher would be denied a license to operate a broadcasting station in a city in which he, she or it published a newspaper. The Court subjected the regulation to minimal scrutiny and concluded that it was constitutional, finding the FCC's goal of promoting diversity in ownership of

mass communications outlets to be in the "'public interest,'" *id.* at 799. Appellants read the Court's opinion to stand for the broad proposition that the First Amendment requires that all regulations which prohibit cross-ownership of different modes of communications in the same market withstand minimal scrutiny.

Appellants misread the *NCCB*. The Court's reasoning explicitly relied upon the fact that the regulation there at issue affected ownership *of the broadcast media*. *See* 436 U.S. at 799-800. *NCCB*, then, falls squarely within the *Red Lion* line of cases. Because the instant case does not involve regulation of the broadcast media,[16] *NCCB* is wholly inapposite.

c.

Appellants next argue that, because common carriers have a monopoly benefit conferred upon them, the government has the right to condition continued enjoyment of this benefit upon acceptance of regulation which would ordinarily be deemed violative of the First Amendment. The underpinnings of this *quid pro quo* argument are highly questionable. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (state cannot limit free speech exercise by corporation chartered under its own laws); *but see id.* at 822-28 (Rehnquist, J., dissenting) (endorsing the *quid pro quo* theory). However, even were it acceptable to engage in such a *quid pro quo* in certain limited circumstances, there is not a true *quid pro quo* here because the benefit of common carrier status is conferred by state and local governments,

[16] *See supra* note 11.



yet Section 533(b) is a burden imposed upon the telephone companies by the federal government. As a result, to whatever extent the *quid pro quo* theory outlined above might otherwise have some vitality, it is inapplicable here.

d.

Last, appellants argue that *Associated Press v. United States*, 326 U.S. 1 (1945), shields Section 533(b) from heightened scrutiny. The issue in *Associated Press* was whether the federal antitrust laws applied to the Associated Press, a news distribution organization then composed of newspaper publishers. Justice Black, writing for the Court, concluded that the generally-applicable antitrust laws were not designed to restrict speech nor, in actual practice, did they. *See id.* at 20 & n.18. Consequently, the First Amendment was not implicated. *See id.*[17]

Section 533(b) is not generally applicable; it regulates only local common carriers. Moreover, as discussed above, Section 533(b), by its plain terms, infringes upon protected speech. Appellants' reliance on *Associated Press v. United States* is therefore misplaced.

[17] *Associated Press v. United States* is only one in a series of cases standing for the proposition that the press is not immune, by virtue of the First Amendment, from regulations of general applicability imposed by the government. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act). *See Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2458 ("[T]he enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment.").

2.

In light of the foregoing, Section 533(b) must survive some form of heightened scrutiny if it is to be found constitutional. The district court found that the regulation at issue in this case should be subjected to intermediate scrutiny. We agree, although our reasoning differs from that advanced by the district court.

We will subject Section 533(b) to strict scrutiny only if it regulates speech based upon content. "[T]he 'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2459 (quoting *Ward*, 491 U.S. at 791).[18] *Turner* outlines a two-step inquiry to be undertaken in determining whether a regulation is content-neutral. First, we must examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates, *see id.* at 2459[19]; *id.* at 2460 (benefits conferred, and burdens imposed, by "must-carry" rules without regard to content). If the regulation's plain language does not, itself, mandate a finding of content discrimination, we then must determine whether, nevertheless there are indications that the regulation's "manifest purpose is to regulate speech because of the message it conveys." 114 S. Ct. 2461. We may discern a statute's manifest purpose from the statute's stated purpose, *id.* at 2461, or from its "design and operation," *id.*

a.

Section 533(b) regulates telephone company provision of "video programming." Because Section 533(b) prohibits telephone company provision of "video programming" regardless of the message it conveys, the burden it imposes on common carriers is not content-based. Similarly, the benefits afforded by Section 533(b) accrue to all cable system operators, regardless of the content of the speech conveyed by their systems. Thus, Section 533(b) does not, by its terms, regulate speech differently according to the message conveyed thereby.

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[18] Although a provision that regulates speech that takes a particular position on a given topic is especially offensive to the First Amendment, *see Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2481 (Ginsburg, J., concurring in part and dissenting in part), a provision that regulates all speech on a given topic, no matter what position with respect to the topic is advanced, is nevertheless content-based. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537 (1980). Thus, we take the *Turner* Court's reference to the "message" speech conveys to refer not only to the particular side of an issue which certain speech might espouse, but also to any idea or topic upon which the speech might comment, regardless of the position or viewpoint taken.

[19] The *Turner* Court explained:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.

114 S. Ct. at 2459 (citations omitted).

The district court found that Section 533(b) regulated speech differently according to its content because the determination of whether "video programming" is being provided requires reference to the content of the programming. "Video programming" is defined at 47 U.S.C. § 522(19) as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." The FCC has interpreted that this definition requires reference to what constituted broadcast television programming in 1984. *Video Dialtone Order*, *supra*, 7 F.C.C. Rcd. 5781 ¶ 74. On this basis, the district court concluded:

> A moment's reflection makes it readily apparent that the cognitive process necessary to apply the video programming definition cannot be accomplished without comparing the content of the image being tested with the content of 1984 broadcast television programming . . . . [T]here is simply no way that § 533(b), incorporating as it does the § 522(19) definition, can be applied without reference to the content of the message being conveyed.

830 F. Supp. at 923 (footnote omitted).

We disagree. While a content-based distinction necessarily involves consideration of the nature of the message sought to be conveyed, the converse is not true in all cases, *i.e.*, that a regulation requires some examination of the speech upon which it has impact does not make the regulation content-based. In particular, the government may validly examine the mode of delivery of speech to determine whether it is delivered in conformity with a "manner" restriction, provided that the restriction does not discriminate based upon the content of speech.



Instructive with regard to when the reference a regulation makes to speech is so unintrusive that the regulation is not thereby rendered content-based is *Regan v. Time, Inc.*, 468 U.S. 641 (1984), where the Court upheld the validity of a statute regulating the size and color of permissible copying of United States currency. Justice White wrote for a four-member plurality [20]:

> [T]he size and color limitations do not discriminate on the basis of content. Compliance with the color and size requirements does not prevent Time from expressing any view on any subject or from using illustrations of currency in expressing those views. More importantly, *the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations. Those limitations restrict only the manner in which the illustrations can be presented.*

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[20] Chief Justice Burger and Justices Rehnquist and O'Connor joined this portion of Justice White's opinion. Justice Stevens concurred in this portion of the plurality's judgment, 468 U.S. at 700-04. Justice Brennan, joined in dissent by Justice Marshall, disagreed with the conclusion reached by the plurality with respect to the size and color restrictions at issue, although they declined to address the question of whether any size and color restriction could be constitutional, *see id.* at 688 n.27. Justice Powell, joined in partial concurrence and partial dissent by Justice Blackmun, would have invalidated completely, on other grounds, the statute containing the size and color restrictions and therefore found it unnecessary to reach the question of whether the size and color restrictions at issue were constitutional, although the opinion makes reference to the "strong policy arguments in favor of upholding the color and size restrictions" identified by Justice Stevens in his opinion, *see id.* at 692.

468 U.S. at 655-56 (emphasis added). Analogizing them to valid restrictions on noise level that can be placed on announcements in residential areas and size and height limitations that can be placed on outdoor signs, the opinion upheld the color and size restrictions.[21] *Id.* at 656; *see id.* at 704 (Stevens, J., concurring in part and dissenting in part) ("Time is free to publish the symbol it wishes to publish and to express the messages it wishes to convey by use of that symbol; it merely must comply with restrictions on the manner of printing that symbol which are reasonably related to the strong governmental interests in preventing counterfeiting and deceptive uses of likenesses of currency."). Examination of Section 533(b) in light of *Regan* establishes that the regulation here at issue is not content-based. Section 533(b) does not regulate speech differently based upon the content of the speech; rather, it distinguishes speech solely on the basis of whether the speech takes the form of "video programming," *i.e.*, on the basis of the mode of delivery of the speech. In short, Section 533(b) is not content-based because, in determining whether "video programming" is being transmitted, "the Government does not need to evaluate the nature of the message being imparted."[22] *Regan*, 468 U.S. at 656; *see Turner*

[21] By contrast, the same Court, with only Justice Stevens dissenting, found that a provision of the statute which turned permissibility of a reproduction of currency upon the purpose of the reproduction was content-based, *see* 468 U.S. at 648-49.

[22] Focusing on a single passage from *Turner Broadcasting System, Inc.* where the Court found that "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject-matter, viewpoint, or for-



*Broadcasting Sys., Inc.*, 114 S. Ct. at 2460 (finding that the "must-carry" rules are not content-based because they "distinguish between speakers in the television programming market . . . based only upon

mat, but rather to preserve access to free television programming for the 40 percent of Americans without cable," 114 S. Ct. at 2461, appellees argue that the Court's use of the word "format" in the foregoing quote indicates that any statute which regulates speech based upon its "format" is content-based and that whether particular speech constitutes "video programming" is a question of "format." We disagree. While the question of whether programming is "video programming" surely goes to the programming's "format," in its most general usage, *see The American Heritage Dictionary* 526 (2d ed.) (defining "format" as "[a] plan for the organization and arrangement of a specified production"), so, too, would the size and color restrictions as to permissible copying of United States currency considered in *Regan*, *supra*. "Format" does not, in every usage, have bearing on "content," however. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-33 (1987) ("Appellant contends that, under applicable state regulations, . . . the critical distinction between newspapers and magazines is *not format*, but *rather content* . . . ." (emphasis added)). We believe, contrary to appellees' position, that the Court in *Turner* intended its use of the word "format" to convey the notion that laws which regulate particular "formats" of speech which are likely to convey particular viewpoints or to engage discussion with respect to particular topics, *i.e.*, *e.g.*, documentaries, news programs, sitcoms, are content-based.

We note, finally, that the FCC interpretation of the statutory language may vest too much discretion in that agency in determining what a telephone company may transmit directly to its local customers. *See Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988). This, however, is a problem distinct from whether Section 533(b) is content-based, and is not raised here.

the *manner* in which speakers transmit their messages, and not upon the messages they carry" (emphasis added))[23]; *cf. City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993) ("sweeping ban on use of newsracks that distribute 'commercial handbills,' but not 'newspapers'" is content-based).

Additionally, while Section 533(b) imposes burdens on speech according to the identity of the speaker, the Court in *Turner* specifically rejected "the broad assertion that all speaker-partial laws are presumed invalid," 114 S. Ct. at 2467,[24] explaining instead that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* In other words, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.*

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[23] We also note that Court in *Turner* rejected the argument, advanced by the dissent in the three-judge district court below, that, because the class of broadcasters to be benefitted by the "must-carry" rules, *i.e.*, local broadcasters, are subject to FCC content-based regulation, the "defin[ition] of the benefitted class *automatically* entails content requirements." *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting). The Court found this argument to "exaggerate[] the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming." 114 S. Ct. at 2463.

[24] To the extent that our decision in *Henrico Professional Firefighters Ass'n, Local 1568 v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981), is to the contrary, it is no longer good law. *See also infra* note 28.



We determine whether a speech regulation partial to certain speakers is content-based mindful of the "physical characteristics" and "economic incentives" inherent to the particular type of speech regulated. *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2467. Here, as described above, the FCC and Congress have regulated the telephone companies' provision of cable service in light of the physical "bottleneck," *id.* at 2466, peculiar to cable communications, *see id.*, and the perception that the telephone companies, absent regulation, would have the incentive and ability to dominate that bottleneck and establish themselves as sole "gatekeeper[s]", *id.*, thereof. Because Section 533(b)'s speaker distinction is thus justifiable entirely on the basis of the peculiar economic and physical venue inherent to cable communications, we conclude that it is not an improper content-based distinction.[25]

b.

That section 533(b) does not, on its face, "burden or benefit speech of a particular content does not end the inquiry," 114 S. Ct. at 2461; "a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys," *id.*

A review of Section 533(b)'s history, including the origins of the precursor FCC rule, discloses no illicit government motive; it instead confirms that the "manifest purpose" of the provision is to inhibit the telephone companies' exercise of monopolistic practices in the cable transport market and to preserve

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[25] We address below the concerns raised by the small size of the class of speakers burdened by Section 533(b).

diversity of ownership of electronic means of access to homes and businesses, not to bar the telephone companies from transmitting programming of a particular content. It is true that Congress' decision to replace, in drafting Section 533(b) based upon the FCC rule, "CATV" with the phrase "video programming" is unexplained. However, in light of the discussion above, we discern no illicit content-discriminatory motive in this decision.

Our content-neutrality analysis is still not at an end, as we have yet to examine Section 533(b)'s "design and operation," 114 S. Ct. at 2461. The *Turner* Court, *id.* at 2462, identified certain "signs" that a content-based regulation will likely exhibit: such a regulation may confer benefits based upon content of speech, "require or prohibit the [expression] of certain ideas or points of view," *id.*, penalize speakers because of speech content, compel speakers to affirm points of view with which they disagree, or "produce any net decrease in the amount of available speech," *id.* All but one of these "signs" are clearly absent here. Section 533(b) does not benefit or burden speech based upon content, it does not require the telephone companies to express points of view with which they disagree or, for that matter, any point of view, and it does not prohibit telephone company expression of any point of view or on any subject.

The question of whether Section 533(b) "produce[s a] net decrease in the amount of available speech" requires closer attention. A regulation that, in fact, decreases the amount of available speech may operate as a content-based regulation because, by limiting the amount of available speech, the likelihood that some point of view or discussion on a particular topic may not occur is enhanced. Along



these lines, the *Turner* Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Id.* at 2468. The Court proceeded to clarify that the First Amendment does not mandate strict scrutiny "for any speech regulation that applies to one medium (or a subset thereof) but not others." *Id.*

> Rather, laws of this nature are "constitutionally suspect only in certain circumstances." [*Leathers*, 499 U.S.], at 444. The taxes invalidated in [*Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983),] and [*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)], for example, targeted a small number of speakers, and thus threatened to "distort the market for ideas." 499 U.S., at 448. Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas. See *Arkansas Writers' Project*, *supra*, 481 U.S., at 228-229; *Minneapolis Star*, 460 U.S., at 585. But such heightened scrutiny is unwarranted when the differential treatment is "justified by some special characteristic of" the particular medium being regulated. *Ibid.*

*Id.* Although common carriers are not members of "the press" insofar as 47 U.S.C. § 202 precludes them from exercising editorial control over the communications they transmit, the foregoing would nevertheless seem applicable to Section 533(b), which restricts a class of speakers from joining the press by operating,

with editorial control and within certain areas, cable systems. Moreover, we see no reason why a government regulation which discriminates against a particular class of speakers behind which "there [is] no evidence [of] an illicit governmental motive," *id.*, but which is "structured in a manner that raise[s] suspicions that [its] objective was, in fact, the suppression of certain ideas," *id.*, would not similarly be subject to strict scrutiny.

Here, because Section 533(b) affects, in any one given geographic area, only the local common carrier, Section 533(b) might be said to be "structured in a manner that raise[s] suspicions that [its] objective was, in fact, the suppression of certain ideas." *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2468; *cf. Arkansas Writers' Project, Inc.*, 481 U.S. at 228 ("[S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State."); *Minneapolis Star and Tribune Co.*, 460 U.S. at 592 ("[W]hen [a tax] exemption [for which only certain members of the press qualify] selects . . . a narrowly defined group to bear the burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."). Once again, however, the peculiar nature of cable service convinces us otherwise. As discussed above, Section 533(b)'s discrimination against telephone companies as speakers is justified entirely by the peculiar economic and physical characteristics inherent in the provision of cable service. Because, then, "the differential treatment [of speakers] is "justified by some special characteristic of the particular medium being regulated," 114 S. Ct. at 2468



(quoting *Minneapolis Star and Tribune Co.*, 460 U.S. at 585), application of strict scrutiny is not warranted.

The fact that the class of speakers affected adversely by Section 533(b) happens to be particularly small does not, in our opinion, change this result. It is true that the Court in *Turner* reached the conclusion that the speaker distinction imposed by the "must-carry" rules there at issue did not warrant strict scrutiny both because the speaker distinction was justified by the peculiar characteristics of the cable medium, *see* 114 S. Ct. at 2468, and because the rules apply "to almost all cable systems in the country, rather than just a select few," *id.* We believe, however, that *Turner*, *Arkansas Writers' Project*, *Minneapolis Star*, and *Leathers* establish that concerns as to the size of the class of speakers adversely affected by a speech regulation arise only where membership in the class is not justified by the characteristics of the particular medium being subjected to regulation.[illegible] The *Turner* Court exception to the presumption that a narrow speaker distinction is constitutionally suspect confirms our belief, for it makes no mention of the size of the speaker class adversely affected by the regulation: "[S]uch heightened scrutiny is unwarranted when the differential treatment [accorded different speakers] is "justified

[illegible] The Court in *Arkansas Writers' Project* and *Minneapolis Star* held the discriminatory taxes there at issue unconstitutional because, *inter alia*, the taxes' speaker distinction, not surprisingly, was not justified by the particular characteristics of the medium being taxed; neither case holds that any speech regulation which regulates a small group of speakers differentially will be treated as constitutionally suspect.

by some special characteristic of the particular medium being regulated." 114 S. Ct. at 2468 (quoting *Minneapolis Star and Tribune Co.*, 460 U.S. at 585). Thus, while a government regulation that "target[s] a small number of speakers [may] threaten[] to 'distort the market for ideas,'" *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2468 (quoting *Leathers*, 499 U.S. at 448), we do not think that a regulation can be said to "target" a group of speakers where the membership in the group is determined solely by the peculiar characteristics of the medium of speech being regulated.

Section 533(b) cannot be said to "target" a small class of speakers; rather, Congress enacted Section 533(b) so as to preserve diversity of ownership of the "bottleneck" of the means of electronic access into homes and businesses. That Congress has determined that this goal is achieved by regulating what turns out, incidentally, to be a small class of speakers does not evince congressional intent to "target" those speakers. *See Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers . . . but not others."). In short, while it is true that, because of the small class of speakers it adversely affects, Section 533(b) bears some "resembl[ance to] a penalty for particular speakers or particular ideas," *Leathers*, 499 U.S. at 449, this apparent resemblance is dispelled by the logical, content-neutral explanation for Section 533(b)'s regulation of this class.

Appellees further argue that the fact that Section 533(b) so severely limits the speech of such a small class of speakers requires application of strict scrutiny. We disagree. As just established, because the



identity and size of the speaker class here adversely affected result solely from the peculiar characteristics of the cable medium, such considerations are not relevant to the content-neutrality inquiry. Putting the size of the class of regulated speakers aside, then, while Section 533(b)'s limitations on telephone companies' speech may aptly be described as "severe," at least in some sense of the word, we cannot say that the limitations imposed are "likely to stifle the free exchange of ideas." *Leathers*, 499 U.S. at 453. Section 533(b)'s operation is in no way content-based. Consequently, the telephone companies are free to engage in speech advancing any view with respect to any topic. Indeed, they may even transmit, with full editorial control, programming, other than "video programming" over their own common carrier networks.[27] For these reasons, we reject appellees' argument in this regard.[28] *See Frisby v. Schultz*, 487 U.S. 474 (1988) (subjecting regulation which prohibited picketing "before or about" any residence to intermediate scrutiny); *cf. Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (ordinance which "com-

[27] We do not mean to imply that such "non-video programming" will be as effective a communicative tool as "video programming." Such a concern, however, does not enter into the content-neutrality analysis we currently undertake; it is properly addressed, and we address it, in our consideration of whether Section 533(b) affords viable alternative means of communication in the context of the application of intermediate scrutiny.

[28] To the extent that our decision in *Henrico Professional Firefighters Ass'n, Local 1568 v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981), is to the contrary, it has been eclipsed by *Leathers* and *Turner* and is no longer good law. *See also supra* note 24.

prehensive[ly] banned distribution of pamphlets regardless of method was "invalid on its face").

Accordingly, we will subject Section 533(b) to intermediate scrutiny and see if it passes muster.

B.

To pass intermediate scrutiny, a content-neutral speech regulation must be " 'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.' " *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). For ease of discussion, we isolate the following prongs which must be satisfied for constitutionality to be concluded: (1) the interests which Section 533(b) purports to serve must be "significant"; (2) Section 533(b) must be "narrowly tailored" to serve those interests; and (3) Section 533(b) must "leave open ample alternative channels for communication of the information" the transmission of which Section 533(b) regulates. We examine each of these prongs *seriatim*.

1.

As discussed above in Section III, dual goals underlie Section 533(b): restricting telephone company exercise of cross-subsidization and pole-access discrimination (perhaps, now that technology allows the telephone companies to transmit video programming directly over their common carrier lines, more aptly described as network-access discrimination) in the cable medium, and preserving diversity of ownership of communications outlets and of the means of electronic access to homes and businesses. To deter-



mine whether these interests are "significant," we need not look beyond the Supreme Court's opinion in *Turner*. First, with respect to the restraint of unfair trade practices on the part of the telephone companies, Justice Kennedy explained, "[T]he government's interest in eliminating restraints on fair competition is always substantial, even where the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." 114 S. Ct. at 2470. Second, with respect to diversity of ownership of communications outlets, Justice Kennedy explained: "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Id.* Also of great significance is the government's interest in "ensur[ing] that private interests not restrict, through physical control of [the] critical ['bottleneck'] of [cable] communication, the free flow of information and ideas," *id.* at 2466. *See id.*

There can be no question, then, but that the interests Section 533(b) serves are "significant."

2.

For a remedy to be considered narrowly tailored, it "need not be the least-restrictive or least-intrusive means" of achieving the government's goal. *Ward*, 491 U.S. at 798. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* at 799 (footnote omitted) (quoting *United States v. Albertini*, 472 U.S. 675, 689

(1985)). However, a regulation that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored. *Id.*

In determining whether a statute is narrowly tailored, we generally "afford great weight to the decisions of Congress and the experience of the [FCC]." *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973). This deference is not without its bounds, however. In the context of intermediate scrutiny, we owe deference to the Congress only to the extent that it makes factual findings regarding the need for the particular measure enacted; "if there are numerous and obvious less-burdensome alternatives to the restriction," *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1510 & n.13, we will not accede to Congress' judgment, *see id.*[29]; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (declining, in determining whether statute banning indecent interstate commercial telephone communications was narrowly-tailored, to accord deference to Congress where "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors"). *See also Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2471 (plurality opinion) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate juridical review." Nonetheless, courts retain an "obligation to exercise independent judgment when First Amendment rights are implicated . . . to assure that, in formulating its judgments, Congress has drawn reasonable inferences based upon substantial evidence.").

In order to determine whether Section 533(b) is "narrowly tailored" to serve the government's signifi-

[29] In *City of Cincinnati*, the Court was faced with a city ordinance which prohibited the placement on public property of newsracks used to distribute commercial publications. The city urged that the regulation at issue reasonably "fit" the city's "substantial" goals of safety and esthetics, as required for a regulation of commercial speech to be constitutional, *see Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The Court rejected this argument, noting, in pertinent part, that "the city['s] fail[ure] to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden of speech imposed by its prohibition." *City of Cincinnati*, 113 S. Ct. at 1510. Explained the Court:

> We reject the city's argument that the lower courts' and our consideration of alternative, less drastic measures by which the city could effectuate its interests in safety and esthetics somehow violates *Fox's* holding that regulations on commercial speech are not subject to "least-restrictive-means" analysis. . . . A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox, supra*, 492 U.S., at 480, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

*Id.* at 1510 n.13. Because commercial speech receives less First Amendment protection than does non-commercial speech, *see Fox*, 492 U.S. at 478, and in light of the fact that intermediate scrutiny also does not impose a "least-restrictive-means" analysis, *Ward*, 491 U.S. at 798, the foregoing clearly applies to determinations of narrow tailoring under intermediate scrutiny.

cant interests, it is necessary first to understand precisely how Section 533(b) has been tailored, *i.e.*, exactly how Section 533(b) purports to fulfill the goals to which it is dedicated. The theory behind Section 533(b) is far from apparent. As described above, it was feared that the telephone companies, as monopolists, would engage in the anti-competitive practices of cross-subsidization and pole-access discrimination, thereby threatening the maintenance of diversity of ownership of the means of communication, that prompted the FCC to enact the regulatory precursor to Section 533(b). With respect to pole-access discrimination, as the district court aptly noted,

> to the extent that the existing Pole Attachment Act does not entirely prevent the possibility of pole access discrimination, effective legislation could be passed to guarantee non-discriminatory access. If discriminatory pole access were the sole concern of Congress in enacting a prophylactic ban on a telephone company's ability to speak through video programming, then such a ban would plainly burden more speech than necessary to further the government's interests.

830 F. Supp. at 930 n.29. We focus, then, on Section 533(b)'s effect on cross-subsidization.

A telephone company will engage in cross-subsidization only if it has both the ability and the incentive to do so. Section 533(b) allows a telephone company, or an affiliate thereof to contract to transmit an unaffiliated entity's cable services over the telephone company's network. Thus, a telephone company may, consistent with Section 533(b), lease to an unaffiliated cable operator "space" on its common carrier network to transmit video programming.



Section 533(b) does not, then, prohibit the telephone companies from cross-subsidizing their entry into the cable transport leasing market; indeed, the appellants do not argue otherwise.[30]

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[30] Appellant NCTA argues:

> If a telephone company can offer only transmission services, the telephone company cannot translate any artificially low prices directly into low prices for cable consumers. The retailer offering the programming directly to consumers sets the retail price and, while paying improperly low prices for transmission, can choose to pocket the transmission savings without lowering retail prices (much or at all).

Appellant NCTA's Br. 42. We are not impressed with the strength of this argument. First, pursuant to 47 C.F.R. § 63.54(e), the mere fact that a telephone company may possess up to a 5 percent ownership interest in a cable operator does not mean that the telephone company and cable operator are "affiliat[ed]." Thus, a telephone company may legally accumulate a holding in the local cable company with which the telephone company has contracted to provide cable transport service sizable enough to argue persuasively that it is advantageous for the cable operator not to "pocket the transmission savings without lowering retail prices," but instead to pass savings along to its customers to drive its cable competitors out of business. Second, and moreover, the evil of cross-subsidization manifests itself in any way that the telephone company can use its common carrier monopoly power to establish dominance in the cable transport market. In the instant context, even if the cable operator with which the telephone company has contracted chooses not to pass the savings it garners as a result of its improperly low transmission costs, the cable operator may instead put those savings toward the purchase of more popular, or simply more, video programming, in an effort to distinguish itself from its competitors. Whether the cable operator opts to "pocket" these savings or not, then, telephone company cross-subsidization will allow that cable operator, and hence the telephone

At best, then, Section 533(b) achieves its goal of eliminating telephone company cross-subsidization by removing the telephone companies' incentive to engage in that practice. The government suggests that the goal which the telephone companies expect to result from the cross-subsidization which they undertake is domination of the video programming market. In particular, the government suggests that cross-subsidization will secure for the telephone companies domination over the cable transport market and domination over the electronic means of access to American homes and businesses; this positioning, in turn, would force video programmers wishing to have their programming transmitted over cable television to do business with the telephone companies. In short, say appellants, it is the promise of the green pastures of domination over the video programming market that provides an incentive, indeed an "irresistible" incentive, *C&P*, 830 F. Supp. at 927, to establish control over the cable transport market. Absent this irresistible incentive, although the telephone companies could still establish domination over the video transport market, they will not act to do so.

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company, to establish dominance over the cable transport market, whereupon the telephone company could likely extract some portion of the unaffiliated cable operator's monopoly profits by virtue of the telephone company's monopoly over the means of transmission. Last, we would observe that one of the downsides of cross-subsidization is the misallocation of telephone company resources and the higher rates common carrier subscribers are obligated to pay as results of cross-subsidization; these evils occur regardless of whether the telephone companies and the cable companies with which they contract seek to use cross-subsidization to dominate the cable transport market.



At this juncture, we assume, *arguendo*, (1) that ordinary regulatory oversight is insufficient to guard against telephone company use of cross-subsidization in the cable transport market; and (2) that the proffered explanation of how the possibility of domination over the video programming market provides an "irresistible" incentive to the telephone companies to engage in unfair competition in the cable transport market, without which they would not so act. We therefore assume that the possibility that a telephone company may engage in cross-subsidization in the cable transport market presents a problem[31] which may properly demand congressional or regulatory attention, and that the problem may properly be addressed by regulation of the video programming market. One problem with Section 533(b) remains: we are not convinced that Section 533(b)'s remedy is narrowly tailored to serve the goal of ameliorating this problem.

The Congress did not buttress Section 533(b) with any underlying factual findings. Even the legislative history, to the extent that is relevant in this regard, *compare Sable Communications of Cal., Inc.*, 492 U.S. at 133 (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote."), offers only a

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[31] We nevertheless echo the district court's observation that, "[e]ven under the government's worst case scenario, in which the telephone companies succeed in driving out all competition for the provision of video transport service, the telephone companies would be in no better position to act anti-competitively in the video programming market than are the current monopolists in the video transport market, the existing cable operators." 830 F. Supp. at 930.

broad statement about preserving diversity of ownership of communications outlets.[32] While the FCC's development of the rule that preceded Section 533 (b) is more fully documented, and while we may presume that Congress relied, at least to some degree, thereon, we note that the FCC's reasoning does not indicate that attention was devoted to the possibility of other, less drastic regulatory schemes that might achieve the substantial government interests enunciated above.[33] Further, perhaps because the

[32] Appellants note that Congress has considered and rejected the possibility of repealing Section 533(b) several times since its enactment. They point to various statements of legislators during these debates indicating a belief that no less restrictive alternative to Section 533(b) would effectively serve the provision's goals. We note, preliminarily, that these statements do not undertake to explain the complex relationship between Section 533(b) and these goals. Moreover, however, we cannot accept as authoritative with regard to a provision enacted by a previous Congress statements by single legislators made during debate of a bill, which was never enacted as law, only one consequence of which would have been the repeal of the provision at issue. "[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute,'" *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)), let alone for determining whether the earlier Congress considered and rejected less restrictive alternatives to that statute.

[33] We would speculate that the FCC at the time it enacted the regulatory precursor to Section 533(b), and, subsequently, the Congress in reliance thereon, may have believed, although erroneously, that a statute banning the telephone companies from the cable television market was constitutional on the same theory as the broadcast television-newspaper cross-ownership ban upheld in *NCCB* and that, therefore, it was unnecessary to devote much attention to the possibility of less restrictive means of achieving the goals desired.

We also note that the Fifth Circuit, in approving the FCC rule that fostered Section 533(b), understood that rule to "bar the telephone companies and their affiliates from engaging in CATV operations in the carriers' service areas." *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 859 (5th Cir. 1971). To the extent that this understanding was accurate, because the FCC rule truly banned telephone company entry into cable television and therefore in particular, the cable transport market, there was no need to understand or make reference to the series of evils outlined in the text. We observe that the Fifth Circuit did not address the question of whether the FCC rule passed muster under the First Amendment and, therefore, did not address the question of whether its desired effect could have been achieved by some alternative less restrictive of protected spech.



FCC's motivation for enacting the regulatory precursor to Section 533(b) was the threat to the cable transport market that telephone company engagement in pole-access discrimination and cross-subsidization posed, the FCC's contemporaneous discussions of its rule do not even hint at the complex of incentives and evils, outlined above, involving the cable transport and video programming markets.

Moreover, we agree with the district court, 830 F. Supp. at 930-31, that an "obvious less-burdensome alternative[]" to Section 533(b) readily presents itself (and indeed has been identified by the FCC as a possible alternative to Section 533(b) in its recommendation to Congress to repeal the provision): Congress could simply limit the telephone companies' editorial control over video programming to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video

programmers, without regard to content. *See Video Dialtone Order, supra*, 7 F.C.C. Rcd. 5781 ¶¶ 141-143.[34]

At bottom, we conclude that Section 533(b) is not narrowly tailored because the government has failed to demonstrate why Section 533(b) does not, by removing the "irresistible" incentive which domination of that market provides, "burden substantially more speech than is necessary," *Ward*, 491 U.S. at 799.[35] *See Turner Broadcasting Sys., Inc.*, 114 S.Ct. at 2470 (plurality opinion) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'. . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." (quoting *Quincy Cable TV, Inc.*, 768 F.2d at 1455)).

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[34] We need not address, and do not purport to address, the constitutionality of this alternative to Section 533(b). We cite the alternative not to imply *its* constitutionality, but only to show that Section 533(b) is itself unconstitutional.

[35] As noted above, the telephone companies have no inherent technological advantage that would allow them to compete unfairly in the video programming market. Nonetheless, if domination of that market provides such an incentive to the telephone companies to overtake the cable transport market, then some additional monitoring of the video programming market, such as the regulatory arrangement outlined in the text, might be in order. Moreover, because the telephone companies possess no inherent advantage in the video programming market, such regulation could likely be less restrictive of speech than is Section 533(b).



C.

Having concluded that Section 533(b) is not "narrowly tailored" to serve the goals to which it is dedicated, we must find that the provision has not been able to withstand intermediate scrutiny. That Section 533(b) is not "narrowly tailored" is not its only infirmity to intermediate scrutiny, however; the provision also does not leave the telephone companies with ample alternative channels for communication.[36]

Whether a regulation leaves open ample alternative methods of communication is more than an inquiry as to whether the regulation "completely silences" the speaker. Rather, for a regulation to be constitutional, the ample alternative methods of communication must be sufficiently similar to the method foreclosed by the regulation. *Cf. Clark*, 468 U.S. at

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[36] The district court made conflicting statements in this regard. In the context of its discussion of this prong of intermediate scrutiny, the district court held:

> [T]here is little doubt that the statute leaves open ample alternative channels for communication. [P]laintiffs remain unfettered in their ability to communicate by any means other than video programming. Moreover, plaintiffs may directly provide video programming to anyone residing outside their area of service. Finally, plaintiffs may communicate with subscribers inside their service area through video programming by producing such programming and marketing it to broadcasters and cable operators.

830 F. Supp. at 926. Elsewhere, however, in its discussion of narrow tailoring, the district court observed, "There is no more draconian approach to solving the problem of potential anti-competitive practice by telephone companies in the cable television industry than a complete bar on their entry into that industry." *Id.* at 928.

295 (upholding Park regulation limiting camping in park to certain areas, noting, "the Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks").

Section 533(b) does not meet this requirement. The statute bars absolutely the telephone companies from entering, with editorial discretion, the cable television market. Appellants argue that the telephone companies have numerous alternative avenues of communication open to them: they may "arrange" to have programming of their choice transmitted to their common carrier subscribers by unaffiliated cable systems or broadcast stations or newspapers. While this may in general be true, the fact remains that the telephone companies cannot guarantee that video programming they wish to transmit to their local audience via cable television, a protected form of speech, will reach their desired audience. Appellants' accurate observation that the telephone companies may own cable systems in areas outside their areas of common carrier service does not address the problem that the telephone companies remain unable to reach the audience of their common carrier subsidiaries should they so choose. While the First Amendment may tolerate speech regulations that "ban [a] particular manner or type of expression *at a given time or place*," *Ward*, 491 U.S. at 802 (emphasis added); *cf. Frisby v. Schultz, supra*, 487 U.S. at 483, 486 (regulation which prohibits picketing "before or about" any residence allows for ample alternative channels of communication because "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by th[e] ordinance"; reasoned the Court: "The type of focused picketing prohibited by the . . . ordinance



is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986) (city ordinance which "leaves some 520 acres, or more than five percent of the entire land are[a] of [the city], open to use as adult theater sites" allows for reasonable alternative avenues of communication); *Clark*, 468 U.S. at 295, it does not accommodate regulations which ban completely a particular manner of expression, *see City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994) (even treating city ordinance which prohibits residents from placing signs on their property as a time, place or manner restriction, the ordinance did not leave open "adequate substitutes . . . for the important medium of speech that [the city] ha[d] closed off"). We conclude, therefore, that Section 533(b) does not afford the telephone companies "ample alternative channels for communication of information" the transmission of which Section 533(b) regulates, *Clark*, 468 U.S. at 293.[37]

V.

Judge Tilley and Judge Russell concur in the foregoing opinion; Judge Michael concurs in the judgment herein. Judge Michael, however, dissents from the inclusion in the opinion of Section IV.A.2., which, in his opinion, is unnecesary to the decision herein.

*AFFIRMED*

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[37] The appellants do not seriously suggest that the telephone companies' ability to transmit non-video programming with full editorial control serves as a channel of communication that is a viable alternative to the provision of "video programming."

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

With the exception of part IV.A.2, which discusses the applicability of "strict scrutiny," I really concur in the majority opinion and in the judgment. I do not join part IV.A.2 because I believe it is unnecessary to the resolution of this case.

As the majority opinion explains, the government's arguments in favor of "minimal scrutiny" are unpersuasive. Section 533(b) warrants some form of heightened scrutiny. And, as the majority opinion convincingly demonstrates, § 533(b) cannot survive intermediate scrutiny: it is not narrowly tailored to achieve the alleged governmental interests and it does not leave open ample alternative avenues of communication. Because the statute cannot even withstand intermediate scrutiny, the strict scrutiny analysis in part IV.A.2 of the majority opinion is academic. *See US West, Inc. v. United States*, 855 F. Supp. 1184, 1193 (W.D. Wash. 1994) (court concluded that § 533 (b) failed intermediate scrutiny and therefore found it unnecessary to determine whether § 533(b) would survive strict scrutiny); *cf. City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (Court did not decide whether Ladue's ordinance was content-based or viewpoint-based because it concluded that the ordinance did not leave open ample alternative avenues of communication). I therefore respectfully decline to join part IV.A.2 of the majority opinion.



**APPENDIX B**

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

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Civ. No. 92-1751-A

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

NATIONAL CABLE TELEVISION ASSOCIATION, INC., INTERVENOR-DEFENDANT

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Aug. 24, 1993

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## MEMORANDUM OPINION

ELLIS, District Judge:

### I.

### A.

Plaintiffs in this case, Chesapeake and Potomac Telephone Company of Virginia ("C & P") and Bell Atlantic Video Services Company ("BVS"), both wholly-owned subsidiaries of Bell Atlantic Corporation, challenge the constitutionality under the First

Amendment of certain provisions of the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), 47 U.S.C. § 521, *et seq.* Specifically, plaintiffs challenge subsections (1) and (2) of 47 U.S.C. § 533(b) ("§ 533(b)"), which prohibit telephone companies, and their affiliates, from providing video programming to subscribers within their service areas.[1]

C & P provides local wireline telephone exchange and exchange access service in portions of Virginia, including the City of Alexandria. It is, without dispute, a common carrier subject to subchapter II of the Communications Act, and therefore subject to § 533(b). BVS is an affiliate of C & P, incorporated in Virginia on September 24, 1992, for the purpose of providing video programming to the public. C & P represents that, in the absence of § 533(b), it would enhance its telephone network in Alexandria to have the capability to carry video programming. *See* Affidavit of Richard A. Alston, C & P's Vice President

[1] Section 533(b) provides in relevant part: (1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. (2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.



of Operations & Engineering, at 1. The resulting network would have the capacity to provide several hundred channels of video programming to C & P's telephone subscribers. *Id.* at 2. C & P would make these facilities available to its affiliate, BVS, and to other video programmers under tariff on a common carrier basis. *Id.* The parties agree that existing fiber optic technology is capable of providing telephone service and transmitting video programming on an integrated basis directly to subscribers. Joint Stipulation of Facts ¶ 3.

In 1992, C & P contacted the City of Alexandria government about the possibility of obtaining a cable television franchise to compete with the existing cable television operator, Jones Intercable. Alexandria's city attorney responded that, in light of § 533(b), the city would not "be in a position to grant any such franchise." Letter of Philip G. Sunderland, City Attorney, City of Alexandria, to J. Howard Middleton, Jr., Hazel & Thomas (Feb. 17, 1993). The city attorney also stated that "the city would be in a position to process a franchise application from C & P were the video programming prohibition in 47 U.S.C. 533(b) removed." *Id.* Alexandria's mayor has submitted an affidavit indicating her support of C & P's proposal, and indicating that, absent § 533(b), C & P's application for a cable television franchise would receive the same consideration as would be accorded any other applicant. *See* Affidavit of Patricia S. Ticer at 2.

Plaintiffs filed the complaint in the instant action on December 17, 1992, challenging § 533(b) as violative of the First Amendment of the United States Constitution, both facially and as applied to their proposed provision of video programming in the City

of Alexandria. Because this is a constitutional challenge to a federal statute, plaintiffs have named as defendants the United States of America, the Federal Communications Commission (the "Commission") and William P. Barr, in his official capacity as Attorney General of the United States[2] (collectively, the "government"). On motion, the National Cable Television Association, Inc. ("NCTA") was permitted to intervene in support of the statute's constitutionality. NCTA accordingly participated in virtually every phase of the litigation, including submission of briefs, preparation of the stipulation of facts, and presentation of oral argument. Less extensive was the participation of thirty-three *amici curiae*,[3] who were limited to submission of briefs.

[2] By a *sua sponte* Order of the Court, Janet Reno has been substituted for William Barr.

[3] The *amici curiae* are: National Association of Broadcasters; Association of Independent Television Stations, Inc.; Tribune Broadcasting Company; Citizens for a Sound Economy Foundation; American Legislative Exchange Council; United States Telephone Association; Ameritech; BellSouth Corporation; Contel of Virginia. Inc. d/b/a GTE Virginia; GTE Service Corporation; NYNEX Corporation; Pacific Telesis Group; Rochester Telephone Corporation; Southwestern Bell Corporation; US WEST Inc.; Consumer Federation of America; Virginia Citizens Consumer Council; Newspaper Association of America; Virginia Press Association; METS Fans United/Virginia Consumers for Cable Choice; Alexandria Federation of Civic Associations, Inc.; Virginia State Conference NAACP; Virginia Association for the Deaf; Northern Virginia Resource Center for Deaf and Hard of Hearing Persons; Virginia Public Interest Coalition; Men's Senior Baseball League; Harlem Consumer Education Council; Pennsylvania Institute for Community Services; Mobile Community Action, Inc.; Self Help Action of Chicago; American Council of Consumer Awareness, Inc.; Colorado River Community Action Council; and New Opportunities for Waterbury, Inc.



After pursuing some formal discovery, the parties, at the Court's invitation, explored the possibility of submitting the matter to the Court on cross-motions for summary judgment by completing discovery informally and cooperatively and undertaking to prepare a joint stipulation of facts. The effort bore fruit. The matter is now before the Court on cross-motions for summary judgment based on a comprehensive stipulation of facts and a supporting record consisting of several thousand pages of affidavits, exhibits, and briefs. Indeed, it is difficult to imagine a more complete record, and it is hard to see how the Court's disposition of the dispute on this record can reasonably be labeled as "summary."

B.

Although § 533(b) was enacted as part of the 1984 Cable Act, telephone companies have been prohibited from providing cable television service since the early years of the cable television industry. Section 533(b) had its genesis in a similar restriction imposed by the Commission in 1970. At that time, the cable television industry was in its infancy and was referred to as community antenna television service ("CATV"). The then-existing technology entailed building large antennas in rural areas and other places unable to receive clear television signals over the air, and stringing cables, often on electric utility or telephone poles, from the central antenna to the CATV customers. In 1968, the Commission ruled that telephone companies must obtain certification pursuant to § 214

of the Communications Act, 47 U.S.C. § 214, prior to constructing, acquiring or operating facilities to provide "channel service" to cable television companies.[4] Because the resulting § 214 applications revealed varying degrees of ownership affiliation between telephone companies and cable television operators, the Commission initiated a rule-making proceeding to ascertain whether telephone companies, either directly or through affiliates, should be permitted to provide cable television service to the public.[5] As a result of this proceeding, the Commission concluded that telephone companies and their affiliates should be precluded, absent specific exemption, from providing cable television service within their local telephone service areas.[6] The Commission based its ruling on

[4] *See General Telephone Co. of California*, 13 F.C.C.2d 448 (1968), *aff'd sub nom. General Telephone Co. of California v. FCC*, 413 F.2d 390 (D.C.Cir.), *cert. denied*, 396 U.S. 888, 90 S.Ct. 173, 24 L.Ed.2d 163 (1969). Section 214 provides in relevant part: No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . . 47 U.S.C. § 214(a).

[5] *See Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Notice of Proposed Rule Making)*, 34 Fed.Reg. 6290 (1969).

[6] *See Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order)* (the "1970 Order"), 21 F.C.C.2d 307 (1970), *recons. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir.1971). Significantly, the court challenge to the 1970 Order did not involve a First Amendment claim.



a finding that the telephone companies had the potential to discriminate against independent CATV providers, in favor of telephone company affiliates, in granting access to telephone poles for attachment of the CATV cables.[7]

In 1978, Congress passed the Pole Attachment Act, which authorized the Commission to "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1). Although this legislation addressed cable operators' fears of discriminatory pricing for pole attachments, the legislation is, by its terms, applicable only if access to poles is actually granted by the owner; it does not mandate such access. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 1111, 94 L.Ed.2d 282 (1987). Thus, the Pole Attachment Act only partially allayed the Commission's concerns regarding cable operators' access to telephone poles and conduit space.

In 1980, the Commission directed its staff to conduct a study of the Commission's cable television cross-ownership policies. This directive culminated in the issuance of a report by the FCC Office of Plans and Policy in November 1981, entitled *FCC Policy on Cable Ownership, A Staff Report* (the "OPP Re-

[7] *See* 1970 Order, 21 F.C.C.2d at 324. ("[T]he monopoly position of the telephone company in the community [results in] effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service. . . .").

port"). The OPP Report considered alternatives to the then-existing Commission policy against telephone company provision of cable television, but concluded by advising that the restriction "must be retained for the time being." OPP Report at 143. The report, while acknowledging that "the problem of pole access" would no longer "by itself" justify the restriction, *id.* at 162, found that additional concerns, noted but not relied upon by the Commission when it had originally implemented the ban, continued to militate against removing the restriction. Chief among these concerns was "cross-subsidization," namely the possibility that telephone companies operating cable television facilities would hide cable costs in their telephone rate bases. Such cross-subsidization "allow[s] a telephone company partially to avoid rate-of-return regulation on its telephone service . . . by attributing costs to the regulated telephone division and revenues to an unregulated cable division." *Id.* at 153. Unchecked, this practice would lead to higher telephone rates and supra-competitive profits for the telephone companies. *Id.* at 158. Such profits, in turn, could be used to underprice competing cable television operators, forcing them out of business, thereby enabling the telephone companies to leverage their regulated local exchange monopoly into an additional monopoly of video transmission services. The Commission took no formal action following release of the OPP Report either to approve or reject the report. The Commission's restriction on telephone companies' provision of cable television within their service areas was retained without modification.

In 1984, Congress passed the 1984 Cable Act, which includes the provisions at issue in this case. Section 533(b) was adapted directly from the regulations established by the Commission's 1970 Order, with the exception that where the Commission had prohibited telephone company provision of "CATV service," the new law prohibited provision of "video programming," defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). Congress also included, as had the Commission's regulations, a rural exemption and waiver authority for the Commission. *See* 47 U.S.C. § 533(b)(3) and (4).



Legislative materials relating to § 533(b) are sparse. No legislative findings of fact accompanied the provisions. The sole specific reference to § 533 (b) in the legislative history of the 1984 Cable Act is a passage in the House Committee Report, which indicates that the intent of the provision was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers. . . ." H.R.Rep. No. 934, 98th Cong., 2d Sess. 56 (1984), U.S. Code Cong. & Admin. News 1984, pp. 4655, 4693. The report indicates that § 533 as a whole, which also includes a prohibition on cross-ownership between television stations and cable systems in the same geographical area (and, in the version of the bill reported by the House of Representatives but not in the final version of the statute, a provision preventing cross-ownership between daily newspapers and cable systems in the same geographical area) was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." *Id.* at 55, U.S.Code Cong. & Admin. News 1984, p. 4692.

In August 1986, less than two years after Congress enacted § 533(b), the Commission directed its

Common Carrier Bureau to prepare a notice of inquiry "on the question of the restriction on cable ownership placed on local exchange telephone companies." 1 FCC Rcd. 864, 897 (1986). A formal Notice of Inquiry was issued a year later, *In re Telephone Company—Cable Television Cross-Ownership Rules (Notice of Inquiry)*, 2 FCC Rcd. 5092 (1987), and was followed by a Further Notice of Inquiry and Notice of Proposed Rulemaking released in September 1988. *In re Telephone Company—Cable Television Cross-Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rulemaking)* (the "FNOI"), 3 FCC Rcd. 5849 (1988). In the FNOI, the Commission tentatively concluded that it should recommend to Congress that § 533(b) be eliminated.

In August 1992, after soliciting a further round of comments, the Commission finally acted on its tentative conclusion, recommending formally to Congress "that it amend the Cable Act to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards." *In re Telephone Company—Cable Television Cross-Ownership Rules (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking)* (the "Video Dialtone Order"), 7 FCC Rcd. 5781, 5847 (1992). The Commission concluded that "the risks of anticompetitive conduct by the local telephone companies in connection with the direct provision of video programming have been attenuated by the enormous growth of the cable industry," with the result that "any remaining risk of anticompetitive conduct by the local telephone companies is outweighed by the potential public interest



benefits their entry would bring." *Id.* at 5848-49. As a consequence, the Commission found that elimination of § 533(b) would "promote our overarching goals in this proceeding by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services available to the public." *Id.* at 5847.[8]

Throughout the period the Commission was considering the issue of telephone company entry into the cable television business, Congress itself was devoting extensive attention to the matter. Repeal of § 533(b) has been considered in numerous Congressional hearings,[9] and proposals to eliminate the statute have

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[8] Ironically, despite the fact that the Department of Justice is the principal litigant defending the validity of § 533(b) in this proceeding, the Department's Antitrust Division also supports repeal of the provision. *See* Reply Comments of the United States Department of Justice, *In re Telephone Company—Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, p. 44 ("The Department believes that LECs [local exchange carriers] should be allowed to own and directly provide video programming."). Another federal agency, the National Telecommunications and Information Administration ("NTIA") of the Department of Commerce has reached the same conclusion. *See*, Comments of NTIA, *In Re Telephone Company—Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, pp. 2-3.

[9] *See Cable Instructional TV and S. 1200 Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 2d Sess. (February 28, 1992); *Cable TV Consumer Protection Act of 1991: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 1st Sess.

appeared in six separate bills since 1989.[10] To date, Congress has declined to modify the provision, despite the recommendation of the Commission, and despite the interim passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), which comprehensively revised regulation of the cable television industry. The Senate Report accompanying the 1992 Cable Act expressly affirmed the Committee's belief that the § 533 (b) ban "enhance[d] competition." *See* S.Rep. No.

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(March 14, 1991); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce,* 102d Cong., 1st Sess. (March 20 and June 26, 1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation,* 101st Cong., 2d Sess. (July 24, 1990); *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation,* 101st Cong., 2d Sess. (March 29 and April 4, 1990); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, (Parts 1 and 2),* 101st Cong., 2d Sess. (March 1, April 19, and May 9, 1990); *Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation,* 101st Cong., 1st Sess. (November 17, 1989); *Competitive Issues in the Cable Television Industry: Hearings Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary,* 100th Cong., 2d Sess. (March 17, 1988).

[10] *See* H.R. 1504, 103rd Cong., 1st Sess. (1993); S. 1200, 102d Cong., 1st Sess. (1991); H.R. 2546, 102d Cong., 1st Sess. (1991); S. 2800, 101st Cong., 2d Sess. (1990); S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989).



92, 102d Cong., 1st Sess. 18 (1991), U.S.Code Cong. & Admin. News 1992, pp. 1133, 1150.

C.

Cable television has changed dramatically since the Commission originally banned telephone companies from participation in the industry in 1970. At that time, CATV reached only approximately 9% of all homes and mainly consisted of small, limited capacity systems in remote communities. *See* Video Dialtone Order, 7 FCC Rcd. at 5848; Joint Stipulation of Facts ¶ 17. Now, cable television is available to over 96% of the nation's homes, and approximately 60% of the television households subscribe. *Id.*

Cable systems carry both the programming of broadcast television stations and programming made by or directly marketed to cable operators. In recent years, the amount of non-broadcast video programming has increased markedly. As of 1992, there were 78 national cable networks, up from only four in 1976. Joint Stipulation of Facts ¶ 9. Cable systems nationwide currently have an average capacity of about 40 channels. *Id.* at ¶ 20. As the parties have stipulated, "the supply of available video programming exceeds the available channel capacity of almost all cable systems." *Id.* at ¶ 19.

Companies operating cable television systems have grown rapidly, commensurate with the growth of the industry. According to the Census Bureau, annual cable operator revenues were $345 million in 1970. *Id.* at ¶27. By 1992, annual revenues of the industry topped $21 billion. *Id.* Many cable systems serving individual communities are owned by large,

national or regional chains known as multiple system operators ("MSOs"). The five largest MSOs combined to serve over 40% of all cable subscribers. *Id.* at ¶ 29. The largest MSO, Tele-Communications, Inc., served 9.6 million cable subscribers in 1991 and had revenues of $3.8 billion. The second largest, Time Warner, had 6.8 million subscribers and total revenue from all sources of $12 billion. *Id.* at ¶ 31.

Despite Congressional efforts to promote competition in the cable industry, the provision of cable television has remained a monopoly service in virtually every commuity. In 1991, cable system operators faced competition from another operator in less than 1% of the localities served by cable. *Id.* at ¶ 28.

In Alexandria, the sole provider of cable television service is Jones Intercable, the country's eighth largest MSO. *Id.* at ¶ 32. Cable service is available to over 90% of all television households in Alexandria, and 57% of television households subscribe. *Id.* at ¶ 18. The system deployed in Alexandria has a capacity of 51 channels, and, as of April 1993, Jones Intercable offered a programming package of 44 channels for $24.65 per month. *Id.* at ¶¶ 21, 34. Plaintiffs note that in nearby Anne Arundel County, Maryland, where Jones Intercable faces competition from another cable service, the company charges only $21.20 per month for a comparable programming package; cable subscribership in Anne Arundel County is over 70%. *Id.* at ¶¶ 34-35.

II.

As a preliminary matter, the government disputes plaintiffs' standing to bring a challenge to § 533(b). Specifically, the government argues that plaintiffs'



injury, the inability to provide cable television service within C & P's service area, is neither "traceable" to § 533(b) nor "likely to be redressed" by a decision invalidating § 533(b). This contention is meritless.

In order to establish standing, at an "irreducible constitutional minimum," plaintiffs must show three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . ; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan v. Defenders of Wildlife,* —— U.S. ——, ——, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (internal citations omitted). Indisputably, the ban on provision of video programming inflicts a concrete, actual injury on plaintiffs. Moreover, contrary to the government's contention, the injury is also "traceable" to the § 533(b) ban and would be redressed by invalidation of the ban.

At the heart of the government's standing argument is the observation that if § 533(b) were lifted, plaintiffs would not instantly be in a position to provide cable television. In support, the government notes that plaintiffs have obtained neither approval

from the Virgina State Corporation Commission nor a franchise from the City of Alexandria to operate a cable television system. Thus, the government contends, plaintiffs' inability to provide cable television is not traceable solely to § 533(b), and invalidation of § 533(b) would not necessarily redress the purported injury that plainitffs have suffered.

The fallacy of this argument is that it is not an essential precondition of plaintiffs' standing that the challenged statute be the sole obstacle to plaintiffs' achievement of their ultimate goal.[11] The fact that § 533(b) stands as an "absolute barrier" to plaintiffs' efforts to operate a cable television service is sufficient, by itself, to satisfy the traceability requirement. *See Arlington Heights*, 429 U.S. at 261, 97 S.Ct. at 561. Similarly, plaintiffs satisfy the requirement that their injury would be "redressed by a favorable decision," simply because invalidation of the statute would allow plaintiffs to pursue regulatory approval and a municipal franchise on the same footing as any other applicant. *See Regents of University of California v. Bakke*, 438 U.S. 265, 281 n. 14, 98 S.Ct. 2733, 2743 n. 14, 57 L.Ed.2d 750 (1978) (standing exists for plaintiff unconstitution-

[11] *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977) (standing exists where challenged statute was "absolute barrier" to plaintiff's goal, despite the fact that invalidation of statute would not "guarantee" achievement of that goal); *see also Nyquist v. Mauclet*, 432 U.S. 1, 6 n. 7, 97 S.Ct. 2120, 2124 n. 7, 53 L.Ed.2d 63 (1977) (unnecessary for plaintiff to apply for and be denied a loan in order to establish his standing to challenge the statute making him ineligible for the loan, "in light of the certainty of [the loan's] denial" under the statutory scheme).



ally deprived of opportunity to *compete* for a benefit, without proof that, in the absence of the challenged program, plaintiff necessarily would have received the benefit).

It would be both formalistic and wasteful of governmental and societal resources to require, as the government suggests is necessary, that plaintiffs engage in a doomed effort to obtain a municipal franchise and state regulatory approval for their venture, even in the face of a federal statute that expressly forbids them from engaging in the activity in question. The futility of any such undertaking is underscored by the predictable response of the Alexandria city government, which refused, in light of § 533 (b), to consider C & P's preliminary efforts to obtain a municipal franchise. *See* Letter of Philip G. Sunderland, City Attorney, City of Alexandria, to J. Howard Middleton, Jr., Hazel & Thomas (Feb. 17, 1993).

In essence, it is the government's position that C & P, a local telephone company, does not have standing to challenge a statute that expressly and exclusively restricts the activities of local telephone companies. Such a contention is manifestly against the thrust of the Supreme Court's decisions on standing,[12] and is therefore rejected. Plaintiffs have proper standing to bring this action.

[12] *See, e.g., Lujan*, —— U.S. at ——, 112 S.Ct. at 2137 ("When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused

## III.

### A.

The fundamental constitutional question that must be addressed in relation to plaintiffs' First Amendment claim is the appropriate level of judicial scrutiny to be applied to § 533(b). Generally, regulations that are alleged to infringe upon speech protected under the First Amendment are subjected to one of two levels of scrutiny. First, the "strict scrutiny" standard is applicable to content-based regulations. This is the most stringent standard, for "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, —— U.S. ——, ——, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) (internal citations omitted). As a result, "content-based regulations are presumptively invalid." *Id.* A content-based regulation can survive only if the government " 'show[s] that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, —— U.S. ——, ——, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209 (1987)).

Regulations that are not content-based, but which still infringe upon protected speech may be accorded a lower, "intermediate" level of scrutiny. Thus, the government may, "impose reasonable restrictions on

him injury, and that a judgment preventing or requiring the action will redress it.").



the time, place, or manner of protected speech" without triggering strict scrutiny, provided, *inter alia*, that such restrictions are content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). Similarly, the government may regulate conduct, even when such conduct has an expressive element, provided that it does not "proscribe particular conduct *because* it has expressive elements." *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989). The Supreme Court has ruled that either type of content-neutral regulation will survive scrutiny under the First Amendment if the provisions in question pass the test first enunciated in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), and refined in later decisions, namely, that the provisions " 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)); *see also Community for Creative Non-Violence*, 468 U.S. at 298, 104 S.Ct. at 3071 (indicating that the constitutional test for the validity of time, place, or manner restrictions is "in the last analysis . . . little, if any, different from" the test for restrictions on expressive conduct).

Defendants in this matter forcefully contend that the provisions in question should not be subjected to either of the two forms of heightened review applicable in the First Amendment context. Instead, de-

fendants argue that § 533(b) is an example of "structural" economic regulation, only tangentially related to the First Amendment and, therefore, that § 533(b) should be subjected only to rationality review, that is, that this Court must uphold the provision if it is rationally related to a legitimate government objective. At most, defendants argue, the provision places only an incidental burden on the plaintiffs' First Amendment rights and therefore should be subjected to intermediate scrutiny under the *O'Brien* test.

Plaintiffs reject this view and argue instead that § 533(b) is a direct infringement on their right to speak in a particular forum, thereby directly implicating First Amendment considerations. Moreover, plaintiffs contend that § 533(b) is a content-based restriction on speech and therefore, under Supreme Court precedent, is subject to strict scrutiny. At the least, plaintiffs contend, even if § 533(b) is found to be content-neutral, the incidental burden on plaintiffs' speech necessitates review of the statute under the *O'Brien* test.

Plaintiffs' argument is correct in an important respect; the provision in question must be subjected to a higher standard than mere "rationality review." Section 533(b) directly abridges the plaintiffs' right to express ideas by means of a particular, and significant, mode of communication—video programming. Video programming, as offered by cable operators, has been recognized by the Supreme Court as a form of speech protectible under the First Amendment. *See Leathers v. Medlock*, 499 U.S. 439, ——, 111 S.Ct. 1438, 1442, 113 L.Ed.2d 494 (1991) ("Cable television . . . is engaged in 'speech' under



the First Amendment"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986) ("[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable television operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats."). As such, a statute that directly abridges the right to engage in this form of speech must be evaluated under the heightened standards that have evolved under the Supreme Court's First Amendment decisions. This is true even when the abridgement is an incidental effect of a statute directed at non-speech activity, such as "structural" economic regulation, if such a statute disproportionately impacts entities engaged in speech protected by the First Amendment. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 106 S.Ct. 3172, 3176, 92 L.Ed.2d 568 (1986).

Defendants' authorities in support of rationality review are all distinguishable. With one exception,[13] the cases cited in support of this position deal with regulations directed at the broadcast media. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972); *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). In each of these cases, the Supreme Court explicitly premised its ruling on the fact that there is a physical scarcity of electromagnetic frequencies available for utilization

[13] *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), discussed *infra*.

by prospective broadcasters. *See, e.g., National Broadcasting Co.*, 319 U.S. at 226, 63 S.Ct. at 1014 ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). In light of the physical scarcity of electromagnetic frequencies, the Supreme Court has accorded Congress greater latitude under the First Amendment to regulate broadcasters than other forms of communication media, to ensure that the "public interest" is served. *See, e.g., National Citizens Committee*, 436 U.S. at 795, 98 S.Ct. at 2112.

Of course, viewing only the end product, cable television is largely indistinguishable from broadcast television. Yet enormous differences in the technology used to convey the respective forms of communication clearly warrant different treatment of cable television under the First Amendment. *See, e.g., Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975) ("Each medium of expression . . . must be assessed for First Amendment proposes by standards suited to it, for each may present its own problems."). As the parties have stipulated, "There are no absolute physical barriers to the construction of competing multichannel cable services attributable to the physical scarcity of the electromagnetic spectrum." Joint Stipulations of Fact, ¶ 37. Moreover, while there may, at some point, exist an absolute physical constraint on the number of cables that could be strung along existing utility rights-of-way in order to service individual households, the number of cable opera-



tors that could simultaneously service a household is so large as to be infinite for purposes of First Amendment analysis.[14]

The only scarcity argument that defendants could legitimately advance to make the broadcasting cases apposite is that the cable television industry is a natural monopoly and, therefore, that certain economic factors conspire to create a condition of scarcity in the market for cable television analogous to the scarcity imposed on broadcasting by the physical properties of the electromagnetic spectrum. This argument has been foreclosed, however, by the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). There, the Supreme Court struck down a state statute requiring a newspaper, under certain circumstances, to publish an editorial reply by a candidate who had been assailed in the newspaper. The statute in question was similar, in its requirement of mandated access, to the Commission's "fairness doctrine," applicable to radio broadcasters, which had been upheld in *Red Lion*. 395 U.S. at 367, 89 S.Ct. at 1794. Significantly, the Supreme Court struck down the statute despite accepting the assumption that there had evolved a "monopoly of the means of communication" and citing a study finding that "'[o]ne-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities.'" *Tornillo*, 418 U.S. at 249-50 &

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[14] *See* Joint Stipulation of Fact, ¶ 40 ("In general, multiple lines of coaxial cable or fiber optics can be placed next to each other without mutual interference to video signals they carry. This means competing cable transmission systems can exist side-by-side without such interference.").

n. 13, 94 S.Ct. at 2835-36 & n. 13. The clear implication of *Tornillo* is that the principle that allows an increased level of government intervention under conditions of physical scarcity is inapplicable when scarcity results from purely economic forces. As a result, an assertion that the cable television industry is a natural monopoly is insufficient to bring the present case within the ambit of the broadcast cases.[15]

While defendants cannot argue scarcity, they make a related argument, namely that, as beneficiaries of a government-sanctioned monopoly for the provision of local wireline telephone exchange services, plaintiffs may have their right to continued status as a monopoly subjected to certain conditions imposed by the government. It is permissible, defendants contend, that among those conditions the government require that the plaintiffs refrain from providing video programming to customers within their service areas. Defendants argue that, in effect, plaintiffs have a choice: in any given area, they may provide video programming or local telephone service; they may not do both. Thus, § 533(b) does not absolutely preclude plaintiffs from offering video programming—if they wish to do so, they simply must abandon their local wireline exchange monopoly.

It is unnecessary, in the context of this litigation, to reach the thorny legal question of when, and under what circumstances, the government may condition a benefit upon the beneficiary's relinquishment of a

[15] For a more extensive discussion of the inapplicability of the scarcity doctrine to regulation of cable television, see *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-46 (D.C.Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).



constitutional right.[16] Section 533(b) is simply not part of a *quid pro quo* exchange in which the telephone companies were offered the opportunity to operate a monopoly service in return for accepting restrictions on their First Amendment rights. To be sure, "the BOCs [Bell Operating Companies] have monopolies over local telephone exchange service in their respective service areas." *United States v. Western Electric Co.*, 993 F.2d 1572, 1578 (D.C.Cir. 1993). Similarly, there is no question that in this jurisdiction, as in most others, the state government has taken actions to preserve the local exchange monopoly of the BOC.[17] Even so, defendants' *quid pro quo* argument is unpersuasive.

[16] *Compare, e.g., Buckley v. Valeo*, 424 U.S. 1, 57 & n. 65, 96 S.Ct. 612, 653 & n. 65, 46 L.Ed.2d 659 (1976) (indicating that law imposing campaign spending limits was unconstitutional abridgement of a candidate's freedom of speech, but that Congress could condition the candidate's acceptance of public financing on an agreement to abide by such spending limits) with, *e.g., Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). *See also Rust v. Sullivan*, —— U.S. ——, —— - ——, 111 S.Ct. 1759, 1774-76, 114 L.Ed.2d 233. This area of the law has spawned a great deal of academic interest. *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U.L. Rev. 675 (1992); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1415 (1989).

[17] *See* Virginia Code § 56-265.4:4(A) ("No certificate shall be granted to an applicant proposing to furnish local exchange

First, the sovereign which purportedly provided the benefit to the plaintiffs is not the same sovereign that placed the condition on the benefit. As noted above, it is the Commonwealth of Virginia that has legislated in support of the plaintiffs' local exchange monopoly. In no way can defendants persuasively argue that the federal government has sanctioned plaintiffs' monopoly. Far from it, the record reflects vigorous steps by the federal government to minimize the anti-competitive consequences of the local exchange monopoly.[18] Having provided no benefit to

telephone service in the territory of another certificate holder unless and until it shall be proved to the satisfaction of the Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience. If the Commission shall be of the opinion that the service rendered by the existing certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, that certificate holder shall be given reasonable time and opportunity to remedy the inadequacy before any certificate shall be granted to an applicant proposing to operate in that territory.").

[18] In this regard, plaintiffs point to recent technological advances, encouraged by the FCC, which have provided individuals with increasing opportunities to utilize communication methods that would bypass the BOC's exchange networks. Examples include the establishment of Competitive Access Providers employing fiber-optic or microwave technologies, the licensing of increasing numbers of cellular phone service providers, and the experimental licensing of additional radio-based telephone providers offering personal communication services. *See* Joint Stipulation of Facts, ¶¶ 47, 53, 55. Even more indicative of the federal government's antipathy toward the BOCs' monopoly of local exchange services is the AT & T consent decree litigation, brought by the Department of Justice, which resulted in the divestiture by AT & T of the BOCs. Contrary to the defendants' contention that the Modified Final Judgment ("MFJ") entered by Judge Greene in *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983), signals the federal govenrment's complicity in the existence of the BOCs' monopoly, the "very purpose" of the MFJ was to prevent the operator of the local exchange monopoly (which, prior to the litigation, was AT & T) from leveraging its monopoly into other, potentially competitive, markets in the communications industry—most significantly, the interexchange (long distance) transportation of communication services. *Id.* at 188. Judge Greene explicitly recognized, and approved of, the fact that evolving technology would likely result in an eventual challenge to the BOCs' monopoly of local exchange services. *Id.* at 175.



plaintiffs, the federal government cannot be heard to argue that, by restricting the plaintiffs' First Amendment rights, it has merely placed a condition on a benefit it has granted. *C.f. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79 n. 14, 98 S.Ct. 1407, 1416-17 n. 14, 55 L.Ed.2d 707 (1978) (restriction imposed by one sovereign cannot be justified by grant of benefit by different sovereign).

Nor was § 533(b) a condition of plaintiffs accepting the local exchange monopoly. The state government sanctioned plaintiffs regulated monopoly long before, and for reasons unrelated to, the federal government's passage of § 533(b). In no way is there a *quid pro quo* relationship between § 533(b) and the local exchange monopoly.

Besides, the Supreme Court has given no indication that any government's grant of monopoly status to an entity is sufficient to allow it to restrict that entity's First Amendment rights. Indeed, its decisions suggest the contrary. *See Central Hudson Gas*

*& Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 568, 100 S.Ct. 2343, 2352, 65 L.Ed.2d 341 (1980) ("appellant's monopoly position does not alter the First Amendment's protection for its commercial speech"); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 534 n. 1, 100 S.Ct. 2326, 2331 n. 1, 65 L.Ed.2d 319 (1980) ("Nor does [appellant's] status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights."). Taken to its logical extreme, defendants' argument would mean that because state governments have chosen to confer certain advantages on businesses that opt to incorporate, any corporate speaker is, as a beneficiary of those advantages, subject to having conditions placed on its right to free speech. This proposition has flatly been rejected by the Supreme Court. *See Bellotti*, 435 U.S. at 778-79 n. 14, 98 S.Ct. at 1416-17 n. 14. Accordingly, this Court rejects defendants' argument that § 533(b) may be characterized as a *quid pro quo* exchange of monopoly benefits in return for acceptance of First Amendment restrictions and, therefore, that the provision need only be accorded rationality review.

The last case defendants cite in support of rationality review is *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). In that case, the Supreme Court upheld the application of the antitrust laws to enjoin members of the Associated Press from a concerted refusal to deal with non-members of the organization. In addressing the First Amendment implications of the decision, the Supreme Court declined to apply any heightened form of scrutiny to the application of the antitrust statutes, despite the fact that the decision compelled the



members of the Associated Press to share access to their news stories and thus, arguably, to "speak" in a manner contrary to their wishes. *Id.* at 19-20, 65 S.Ct. at 1424-25.

*Associated Press* stands only for the proposition, confirmed in numerous other decisions, that the media may be subjected to economic regulations that are generally applicable to all industries without triggering heightened review of such regulations under the First Amendment. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93, 66 S.Ct. 494, 497, 90 L.Ed. 614 (1946) (application of Fair Labor Standards Act); *Associated Press v. NLRB*, 301 U.S. 103, 132-33, 57 S.Ct. 650, 655-56, 81 L.Ed. 953 (1937) (application of National Labor Relations Act). The Supreme Court has made clear, however, that this line of cases does not mean that economic regulation is subject only to rationality review regardless of the degree to which the regulation impinges on an entity's First Amendment activity. To the contrary, *O'Brien* and its progeny have plainly held that heightened scrutiny will be applied to those governmental actions that have a significant, disproportionate, impact on expressive conduct, even if such impact is only an incidental effect of the statute. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295 (1983) ("differential treatment . . . of the press" implicates the First Amendment and is "presumptively unconstitutional").

Section 533(b) is not a generally applicable statute; it applies to a sharply limited number of entities —companies providing local telephone exchange services. Moreover, § 533(b) achieves its aim by means

of a direct abridgement of the telephone companies' right to participate in a protected form of speech. This is centrally significant, for the Supreme Court has never accorded mere rationality review to a statute, even a "structural" economic regulation, that, on its face, prohibited a specific category of speakers from engaging in a protected form of speech. *C.f. Arcara*, 478 U.S. at 697, 106 S.Ct. at 3172 (refusing to apply heightened First Amendment review to statute that incidentally burdened First Amendment rights but was not expressly "directed" at communicative activity). In light of *O'Brien* and its progeny, § 533(b) must plainly be evaluated on a standard higher than mere "rationality" review.

B.

At first glance, it would appear virtually certain that a statute restricting telephone companies from providing video programming to customers within their service areas would fall within one of the two content-neutral categories, either as: (1) a time, place, and manner restriction on the form of the telephone companies' speech [19] or (2) an economic regula-

[19] Plaintiffs argue that § 533(b) cannot properly be viewed as a "time, place, or manner restriction" because the statute precludes them entirely from reaching a specific audience by use of a specific means of communication. This argument has no merit. Plaintiffs greatly overstate the blanketing effect of the restriction placed upon them. Plaintiffs may provide video programming to audiences outside their service area, and may speak through any type of non-video medium to audiences inside their service area. Even more significantly, however, plaintiffs may also reach audiences within their service area with video programming. Section 533(b) only prohibits plaintiffs from *directly* providing video program-



tion directed at non-speech conduct, but inflicting a substantial, and disproportionate, incidental effect on the telephone companies' right to engage in expressive activity. After all, had Congress chosen to prohibit telephone companies from transmitting any visual image, the resulting statute would almost certainly be content-neutral, and there would be no persuasive argument that such a statute would be subject to strict scrutiny.[20] Yet, analysis cannot end

ming to their subscribers. Plaintiffs are not prohibited from producing their own video programming and marketing it to broadcasters or cable operators for transmission by means other than the plaintiffs' own facilities. Public access requirements ensure that such programming cannot be silenced by the entities responsible for the direct provision of video programming. Clearly, then, § 533(b) operates only as a restriction on the "manner" in which plaintiffs may speak, not as an outright ban on their ability to do so.

[20] The Court rejects plaintiff's contention that § 533(b) should be subjected to strict scrutiny solely because it singles out a particular class of speaker, the telephone companies and their affiliates, for unfavorable treatment. Strict scrutiny is not applicable to a statute which targets a particular class of speaker, provided that class is sufficiently large, unless the statute also discriminates based on the content of the speech. See *Leathers*, 499 U.S. at ——, 111 S.Ct. at 1446 ("a differential burden on speakers is insufficient by itself to raise First Amendment concerns"); *Turner Broadcasting System, Inc. v. FCC*, 819 F.Supp. 32, 42 (D.D.C.1993) ("'Speaker-partial' regulations, or those that purportedly favor one group of speakers at the expense of others . . . are not subject to strict scrutiny unless they are content-based."), *appeal pending*. To the extent that the Fourth Circuit's opinion in *Henrico Professional Firefighters Association v. Board of Supervisors*, 649 F.2d 237 (4th Cir.1981), can be read to hold that speaker-partiality alone is sufficient to trigger strict scrutiny, that aspect of the opinion has been implicitly overruled by the

here for § 533(b), as written and enacted, requires reference to the content of the relevant message in order to determine whether a particular visual image qualifies under the statutory definition of "video programming." This circumstance substantially complicates the analysis concerning whether § 533(b) is a content-based or content-neutral regulation.

The 1984 Cable Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). The

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Supreme Court's decision in *Leathers*. The Court also rejects plaintiffs' argument that, based on the Supreme Court's decisions in *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) and *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), there is a separate, and heightened, standard of review applicable when the government seeks to "eliminate an entire category or manner of speech, even on the basis of a content-neutral restriction. . . ." Plaintiffs' Reply Br. at 40. The *Schneider* and *Martin* decisions are best read, not as inaugurating a conceptually separate, and still viable, standard of review, but rather, as foreshadowing the Supreme Court's modern "time, place, and manner" doctrine. Specifically, these cases stand for the proposition, made explicit in cases such as *Ward*, 491 U.S. at 789, 109 S.Ct. at 2753, and *Clark*, 468 U.S. at 293, 104 S.Ct. at 3069, that a "time, place, and manner" restriction will not survive the *O'Brien* test unless the statute preserves ample effective alternative channels for communication. *See Martin*, 319 U.S. at 146, 63 S.Ct. at 865 ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *Schneider*, 308 U.S. at 164, 60 S.Ct. at 152 ("[P]amphlets have proved most effective instruments in the dissemination of opinion. . . . [Interference with] the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.").



parties do not dispute that § 533(b) permits the telephone companies to transmit visual images such as the face of a clock reflecting the current time, or the image of a person speaking to the viewer by picturephone. Such images are permissible under the statute because they are not comparable to programming that was provided by a television broadcast station in 1984.[21] A moment's reflection makes it readily apparent that the cognitive process necessary to apply the video programming definition cannot be accomplished without comparing the content of the image being tested with the content of 1984 broadcast television programming. Despite defendants' protestations to the contrary, there is simply no way that § 533(b), incorporating as it does the § 522(19) definition, can be applied without reference to the content of the message being conveyed.[22]

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[21] The Commission has ruled that the standard is not an evolving one, dependent on the innovations in broadcast television programming, but rather that the standard must be interpreted with reference to the content of broadcast television at the time of the passage of the statute. *See* Video Dialtone Order, 7 FCC Rcd. at 5820. The parties have not challenged this interpertation, nor suggested any reason why the interpretation is unreasonable, so the Court defers to the Commission's interpretation in accordance with the principle set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

[22] Illustrative of this point is the following colloquy between the Court and government counsel at the hearing on the cross-motions for summary judgment: THE COURT: Let's suppose it [the statute] says telephone companies can't send television programming, but they can send [The McNeil/Lehrer Newshour]. Would that be constitutional? MS. WILSON: No, it would not be constitutional. . . . THE COURT:

The line between permissible visual images and impermissible "video programming" has become increasingly blurred with the advance of technology. This is nowhere more evident than in the Commission's most recent interpretation regarding the scope of the § 533(b) ban, the Video Dialtone Order. *See* 7 FCC Rcd. at 5781. In that action, the Commission modified its rules to allow telephone companies to provide a package of video services known as "video dialtone." The Commission found that its action did not violate § 533(b) because the video services included within the video dialtone package did not meet the statutory definition of "video programming." In "clarifying" its interpretation of the scope of § 533(b), the Commission presented the following example:

> We . . . conclude that programming that includes multimedia graphics and information services that incorporate video images generally would not be video programming because the video images are not severable from the program service. . . . For instance, an educational multimedia presentation which may contain video images would be permissible under our interpre-

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Well, let me go on . . . . Let's suppose then it says . . . you may not sent the news programs and you may not send sitcoms. That wouldn't pass muster either, would it? MS. WILSON: That's right. THE COURT: And I guess you can see I can give you a list of what's on television in 1984. . . . If you got out the T.V. Guide for 1984 you could end up with a generic list of all the stuff that's on television. And, why wouldn't that then also not pass muster? . . . What's the difference [between that and the statutory definition of "video programming"] ? Tr. at 45-47.



> tation. . . . We do not contemplate, however, that the simple inclusion of some textual information, for example, could transform a severable video program into a permissible multimedia program.

Video Dialtone Order, 7 FCC Rcd. at 5822 & n. 196. Fortunately, the Court is not called upon to interpret or apply this language. Apparently, the Commission will allow telephone companies to transmit presentations that are primarily textual, and include some video segments, but will prohibit presentations that are primarily video, and include some textual segments. Irrespective of whether this is a workable line of demarcation, the example is noteworthy because it shows that the Commission's interpretation is inescapably premised on the content of the relevant transmission.[23]

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[23] Contrary to defendants' assertions, the present case is clearly distinguishable from *Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984), in which the Supreme Court found content-neutral a federal statute requiring all reproductions of United States currency to be in black and white and to be smaller than three-fourths or larger than one and one-half the size of the original. In that case, the Supreme Court found that "the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations." *Id.* at 656, 104 S.Ct. at 3271. This case is different; application of § 533(b) does not involve a simple comparison of sizes or colors. Even if the FCC purported to propound a precise line of demarcation (*i.e.* over 50% "video programming" would bring a multimedia presentation within the scope of the statute), determination of which images were video and which were not would still inescapably involve content-based judgments.

Notwithstanding the fact that application of § 533 (b) depends on the content of the telephone companies' proposed message, the section cannot, under recent Supreme Court precedent, be considered a content-based restriction. Recent decisions have made clear that "strict scrutiny" is not triggered because *application* of a speech restriction is dependent on the content of the speech. Rather, "[g]overnment regulation of expressive activity is content-neutral [and therefore not subject to strict scrutiny] so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791, 109 S.Ct. at 2754 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293, 104 S.Ct. at 3069) (emphasis added by the *Ward* opinion). "The government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2754.

The import of this distinction was made apparent in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), in which the Supreme Court was faced with a municipal ordinance imposing zoning limitations on the location of "adult theaters." The applicability of the ordinance in that case to any specific theater clearly turned on an evaluation of the content of the films exhibited at that theater. Nevertheless, the Court refused to apply strict scrutiny to the ordinance, holding that the ordinance had been *justified* as a means of preventing various "secondary effects" of adult theaters, such as crime, devaluation of adjacent properties, and alienation of retail establishments, and that such justification was "unrelated to the suppression of free expression." *Id.* 475 U.S. at 48, 106 S.Ct. at 929.

Similarly, the government in this case has advanced two justifications for the § 533(b) ban that



are unrelated to the suppression of free expression: (1) protecting diversity of ownership of communications outlets and (2) promoting competition in the video programming market. Thus, in this case, as in *Renton*, a speech restriction that makes a facial distinction based on content is justified by the government on the basis of certain secondary effects of that speech. Here, as in *Renton*, the government admittedly seeks to restrict speech, on the ground that the prevention of these secondary effects will be advanced by the restriction. If applied here, *Renton* would allow § 533 to escape strict scrutiny and to be subject instead to the less rigorous "intermediate" level of scrutiny prescribed by *O'Brien*. Before proceeding with the analysis, an important objection to *Renton* must be addressed.

*Renton* signals a significant retreat from the traditional content-based/content-neutral distinction. The notion that a legislative act curtailing First Amendment rights is to be evaluated based on its justification rather than on its operation is more than a little troubling. The theoretical underpinning of the content-based/content-neutral distinction in First Amendment jurisprudence has been an awareness that content-based restrictions, whatever their ostensible justifications, afford legislatures increased opportunities to elevate one viewpoint over another. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U.Chi.L.Rev. 46 (1987). Moreover, the distinction is grounded in the notion that courts cannot consistently recognize when a content-based restriction will have the effect of fostering or penalizing a particular viewpoint, or when the legislature's asserted "secondary effect" justification is disingenu-

ous.[24] Thus, any speech restriction, the application of which depends on the message's content, has traditionally, and appropriately, been treated with suspicion by the courts as a potential vehicle for the conscious or unconscious prejudices of the legislature. See *Boos v. Barry*, 485 U.S. 312, 336-37, 108 S.Ct. 1157, 1171-72, 99 L.Ed.2d 333 (1988) (Brennan, J. concurring in the judgment) ("[T]he best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression that government favors as well as expression it disfavors.").

The Supreme Court's recent reliance, in cases such as *Renton*, on a legislature's justification of a statute, rather than on the means by which the statute achieves its ends, preserves the form of the content-neutral/content-based distinction, but guts it of its potency. The *Renton* "secondary effects" doctrine abandons the healthy mistrust of the judiciary's ability to detect viewpoint distorting effects of content-based regulations in favor of a misplaced confidence that either: (a) legislatures will always acknowledge any viewpoint distortion likely to result from a regulation or (b) courts will consistently be able to predict which content-based regulations will be de-

[24] *See Burson v. Freeman*, —— U.S. ——, —— - ——, 112 S.Ct. 1846, 1858-59, 119 L.Ed.2d 5 (1992) (Kennedy, J. concurring) ("Discerning the justification for a restriction of expression, however, is not always . . . straightforward. . . . In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas.").



void of distorting effects. This approach is not likely to be adequately protective of First Amendment values. *See id.* 485 U.S. at 336, 108 S.Ct. at 1172 ("[T]he inherently ill-defined nature of the *Renton* analysis certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected.").

*Renton* remains the only case to date in which a majority of the Supreme Court has found that the government's asserted content-neutral justification for a statute can overcome the fact that the statute, on its face, has drawn a content-based distinction. This lends some force to the plaintiffs' contention that *Renton* should be viewed as an isolated decision, applicable only in the context of sexually explicit speech.

The problem with this argument is that the Supreme Court, just last term, had an opportunity to limit *Renton* in such a fashion, and refused to do so. In *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court was faced with a municipal ordinance that banned newsracks purveying commercial publications from being placed on public property. In *Discovery Network*, as in *Renton* and the present case, the applicability of the relevant ordinance turned on a content-based distinction—in that case, between commercial and non-commercial publications. Cincinnati attempted to rationalize its ordinance, as in *Renton*, and the present case, with content-neutral justifications—in that case, safety and aesthetics. In striking down the ordinance, the Supreme Court distinguished *Renton* by stating, "In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent pub-

lishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, —— U.S. at ——, 113 S.Ct. at 1517. Another section of the majority's opinion states, "[W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing." *Id.* —— U.S. at ——, 113 S.Ct. at 1516. Thus, the opinion invites the inference that, had the city placed in the record some showing of differing effects attributable to the commercial newsracks, *i.e.* that people were more prone to litter with the commercial publications or that the commercial newsracks were bigger, flashier, or in some way a greater eyesore, then the *Renton* analysis would have been applicable and the ordinance might have been upheld. *Discovery Network* is significant, therefore, as an indication that the Court does not view *Renton* as an aberrant decision or the "secondary effects" theory as a limited principle, applicable only to sexually explicit speech. *See also Boos*, 485 U.S. at 312, 108 S.Ct. at 1157-58 (plurality of justices indicate willingness to apply *Renton* analysis to political speech). This apparent general applicability of *Renton* compels the holding here that § 533(b) is a content-neutral restriction, despite the fact that the determination of whether the statute applies to any particular message may only be accomplished by reference to the content of that message. The two interests advanced by the government in support of § 533(b), diversity in the ownership of communications outlets and competition in the video programming market, are, in the



same sense as the secondary effects in *Renton*, justifications which are made "without reference to the content of the regulated speech." *Ward*, 491 U.S. 781, 782, 109 S.Ct. 2746, 2748.

While plaintiffs argue that the statute achieves its ends only by the suppression of speech, and thus that the asserted "secondary effects" justification is itself impermissible, *see Buckley*, 424 U.S. at 48-49, 96 S.Ct. at 648-49 (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"), this argument is, on closer scrutiny, tautological. *Renton* only applies to statutes that restrict speech. Thus any statute analyzed under the *Renton*-type analysis will necessarily achieve its goal of regulating "secondary effects" by means of the suppression of speech. To invalidate a statute simply because the regulation of "secondary effects" is achieved by restricting speech would lead to the result that every statute analyzed under *Renton* would invariably be struck down. *Renton* itself proves that is not the law.

For the foregoing reasons, it follows that, while § 533(b) must be subjected to heightened review as a restriction on plaintiffs' First Amendment rights, it does not warrant the strictest standard of review reserved for content-based restrictions on speech. The fact that § 533(b) is "justified" on grounds unrelated to the suppression of the speech means, notwithstanding this Court's misgivings about the *Renton* reasoning, that the statute must be classified as content-neutral and subjected to the intermediate level of scrutiny first articulated in *O'Brien* and applicable to both "time, place, and manner restrictions" and to incidental burdens on speech.

IV.

*Ward* teaches that a statute will pass the intermediate level of scrutiny if, in addition to being content neutral, it: (1) is narrowly tailored to serve a significant government interest and (2) leaves open ample alternative channels for communication. See *Ward*, 491 U.S. at 789, 109 S.Ct. at 2753. With respect to § 533(b), there is little doubt that the statute leaves open ample alternative channels for communication. As discussed above, plaintiffs remain unfettered in their ability to communicate by any means other than video programming. Moreover, plaintiffs may directly provide video programming to anyone residing outside their area of service. Finally, plaintiffs may communicate with subscribers inside their service area through video programming by producing such programming and marketing it to broadcasters and cable operators. Plaintiffs are by no means "silenced" by the operation of § 533(b).

Given this, the Court must determine whether § 533(b) is "narrowly tailored to serve a significant governmental interest." As the history of § 533(b) makes clear, the rapidly changing nature of the telecommunications field has caused the rationale supporting the statute to evolve over time. Congress' precise intent in passing § 533(b) in 1984 is made difficult to discern both by the paucity of legislative materials and by the fact that Congress' sole expression of intent—to "codify current FCC rules"—occurred at a time when the Commission's rationale for its own rules was in a state of flux. *Compare* 1970 Order, 21 F.C.C.2d at 324 (stressing pole access concerns) *with* OPP Report at 153-65 (emphasizing threat of cross-subsidization). It is not necessary to the present in-



quiry, however, to parse the record of Commission proceedings and concomitant Congressional statements in order to determine precisely which of the Commission's concerns Congress was seeking to vindicate by passage of § 533(b). For purposes of applying the *O'Brien* test, a reviewing court "must eschew altogether the 'guesswork' of speculating about the motives of lawmakers. . . . Rather, [the court] must look to the face of the regulation and the identifiable interests advanced to justify the regulation." *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1426 (4th Cir.1989), *vacated on other grounds*, 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990); *see also Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 (4th Cir.1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980). As such, § 533(b)'s evolving rationale is non-problematical. Regardless of what rationale may have been offered for § 533(b) at the time of its passage, if, as conditions exist today, the government can assert a justification for the statute such that the statute is "narrowly tailored to serve a significant government interest," then the statute must be upheld.

The government contends that § 533(b) serves two separate, but related, interests: promoting competition in the video programming market and preserving diversity in the ownership of communications media. Upon reflection, however, these concerns can be seen to collapse into a single interest. Section 533(b) simply does not, in a direct fashion, promote competition in the video programming market. As the cable television industry currently exists in the United States, the transport of video programming is a monopoly service. *See* Joint Stipulation of Facts

¶ 28 ("Of the approximately 10,000 communities served by cable, as of 1991, 53 communities had more than one competing cable system in the same locality."). Section 533(b), which serves to bar entry into the market for video transport service by the one class of potential competitors that has exhibited an inclination to compete with the entrenched monopolists, clearly operates in the first instance to restrict competition in the market for video programming by limiting the number of outlets through which such programmings can be distributed. Thus, on the most elemental level, § 533(b) actually reduces competition, both in the market for video transport services and the market for video programming.

It is only by concentrating on the government's other assessed justification, protecting diversity of ownership of communications outlets, that any procompetitive consequences of § 533(b) can be discerned. In essence, the government contends that the telephone companies would be *too* successful if they were allowed to compete in the cable television market. According to the government, without a prophylactic rule keeping them out of the industry altogether, the telephone companies would face irresistible incentives to undertake anti-competitive actions to drive the cable operators out of business. If the telephone companies were allowed to succeed, the resulting situation would be worse for consumers than the *status quo* because rather than having two monopolists—one providing cable television and related services and one providing local telephone exchange service and related services—consumers would be faced with a single monopolist, the telephone company, providing all of their telecommunication services. In addition to its desire to preserve the eco-



nomic benefit of competition between the monopolists for the provision of services outside their "core" monopoly service, the government is also justifiably concerned with the implications of having a single entity in control of *all* electronic communication sources entering an individual's home. Thus, the government asserts, to preserve diversity of ownership of communications outlets, telephone companies must be preserved from entry into the cable television industry.[25] Without question, the preservation of diversity of ownership of communications outlets is a significant governmental interest. *See NCCB*, 436 U.S. at 801-02, 98 S.Ct. at 2115-16 (challenged regulations "are a reasonable means of promoting the public interest in diversified mass communications"); *National Association of Broadcasters* v. *FCC*, 740 F.2d 1190, 1206 (D.C.Cir.1984) ("Traditionally, the FCC has considered diversification of media ownership to be an important objective of federal communications regulatory policy."). Thus, the sole re-

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[25] The government has identified two potential anti-competitive practices that the telephone companies would allegedly have incentive to undertake in the absence of the § 533(b) ban: (1) discrimination in the provision of access to telephone poles and (2) cross-subsidization. It is important to note that the practice of cross-subsidization would have significant negative consequences, such as higher costs to local telephone service ratepayers and misallocation of telephone company resources, regardless of whether the telephone companies were able to amass sufficient market power to become monopolists in the video transmission market. Thus, the evil targeted by § 533(b) is not limited to the end result of the telephone companies' predicted anti-competitive practices, but includes also the negative consequences arising from the *process* of attempted monopolization.

maining question under the *O'Brien* test is whether § 533(b) is narrowly tailored to serve that interest.

As the *Ward* decision makes clear, in the context of intermediate review under *O'Brien*, the remedy chosen by Congress "need not be the least-restrictive or least-intrusive means" of achieving Congress' goal. 491 U.S. at 796-99, 109 S.Ct. at 2757-58. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* 491 U.S. at 799, 109 S.Ct. at 2758 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906-07, 86 L.Ed.2d 536 (1985)). The regulation in question may not, however, "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* As the Court explained in *Discovery Network*:

> A regulation need not be "absolutely the least severe that will achieve the desired end," but if there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

—— U.S. at —— n. 13, 113 S.Ct. at 1510 n. 13 (quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388 (1989)) (internal citation omitted).[26]

[26] While the language in *Discovery Network* is addressed to the "reasonable fit" requirement applicable to regulation of commercial speech, not the "narrowly tailored" requirement in *Ward*, the Supreme Court has previously noted the essential equivalence of these two formulations. *See Fox*, 492 U.S. at 475-80, 109 S.Ct. at 3032-35. There is no reason to doubt that the language in *Discovery Network* would be equally applicable to the "narrowly tailored" requirement. *See Arlington County Republican Committee* v. *Arlington County*, 983 F.2d 587, 594 (4th Cir.1993) (existence of less restrictive means is relevant consideration concerning whether statute is narrowly tailored); *see also Ward*, 491 U.S. at 806, 109 S.Ct. at 2762 (Marshall, J. dissenting) ("If a court cannot engage in [inquiries regarding less restrictive means], I am at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.").



There is no more draconian approach to solving the problem of potential anti-competitive practices by telephone companies in the cable television industry than a complete bar on their entry into that industry. In theory, at least, there are a wide range of less restrictive alternatives that Congress and the Commission could have chosen to pursue that would have allowed telephone companies to enter the cable television market, while constraining, through specific legislation or regulatory scrutiny, their power to drive other cable operators out of the industry. If a number of such alternatives are found to be effective means of eliminating the threats at which § 533 (b) is targeted, then the statute certainly is not "narrowly tailored." In short, if there exists a range of regulatory strategies that would effectively eliminate the threat of anti-competitive conduct by the telephone companies in the cable television industry, then § 533(b) would "burden substantially more speech than is necessary to further the government's legitimate interests," and would therefore violate the First Amendment.

It is important to note that, in inquiring into the existence of feasible less restrictive alternatives,

courts must not substitute their judgment on policy matters for that of Congress. *C.f. Community for Creative Non-Violence,* 468 U.S. at 299, 104 S.Ct. at 3072 (reversing Court of Appeals for disagreeing with Park Service over existence of less speech-restrictive alternatives). Certainly, any findings of fact made by Congress concerning the potential effectiveness of Commission regulation of the pole access and cross-subsidization problems would be entitled to substantial deference from the courts. *See Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 103, 93 S.Ct. 2080, 2087, 36 L.Ed.2d 772 (1973).[27] Yet, nowhere in the legislative materials is there any indication that Congress reached a conclusion concerning the effectiveness of less restrictive regulatory measures to combat the potential for anti-competitive practices by the telephone companies in the cable television market. Committee findings are limited to expressions of opinion on the effectiveness of § 533(b), not on the effectiveness of any less restrictive alternatives. Thus, a House Committee Report indicated that § 533(b) would "encourage a diversity of ownership of communications outlets" (H.R.Rep. 934, 98th Cong., 2d Sess. 56 (1984) U.S. Code Cong. & Admin.News 1984, p. 4693), and a more recent Senate Committee Report opined that the § 533(b) ban "enhance[s] competition" (S. Rep. No. 92, 102d Cong., 1st Sess. 18 (1991) U.S. Code Cong. & Admin.News 1992, p.

[27] Although, obviously, "whatever deference is due legislative findings would not foreclose [the courts'] independent judgment of the facts bearing on an issue of constitutional law. . . ." *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 129, 109 S.Ct. 2829, 2838, 106 L.Ed.2d 93 (1989).



1150). Yet, no Congressional finding has ever been made concerning whether these goals could be accomplished by means of a less intrusive measure than a complete prophylactic ban.

Defendants contend, in light of the extensive Congressional attention devoted to this issue,[28] that it is appropriate to impute to Congress a finding that all less restrictive alternatives were infeasible. The Court declines this invitation. It cannot be law that, whenever Congress passes a statute infringing on the right to free expression, it will be inferred by reviewing courts that Congress considered and rejected the effectiveness of all less restrictive alternatives. Such a proposition would reduce the "narrowly tailored" prong of the *O'Brien* test to a nullity. Rather, this court must undertake its own review of the record to determine whether Congress "reasonably *could have*" found that a prophylactic ban was necessary to effectively accomplish Congress' purposes. *See San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee,* 483 U.S. 522, 539, 107 S.Ct. 2971, 2982, 97 L.Ed.2d 427 (1987) (emphasis added).

In assessing whether § 533(b) is indeed necessary, it is essential to carefully examine precisely what the statute prevents. Section 533(b) prohibits a telephone company from directly providing video programming to subscribers in its service area. Significantly, the statute has not been interpreted to prohibit a local telephone company from providing video transport services. Thus, a telephone company is permitted to run a cable into a subscriber's home and then to lease channels of communications on that

[28] See n. 9 & n. 10, and accompanying text, *supra.*

cable to unaffiliated entities, such as cable operators. *See* Joint Stipulation of Facts, ¶¶ 5, 74; *see also* Video Dialtone Order, 7 FCC Rcd. at 5787 & n. 21. The telephone company only runs afoul of the statute by exercising control or discretion over the programming transported over its facilities.

The fact that telephone companies are not precluded under existing law from competing in the market for video transport services is of paramount significance to the outcome of this case. The government's asserted justification for § 533(b), preservation of diversity in the ownership of media outlets, is premised on the fear that telephone companies will engage in pole access discrimination and cross-subsidization in an attempt to monopolize the video transport market. Surprisingly, however, § 533(b) is irrelevant to the telephone companies' ability to undertake such practices. Put another way, the ban imposed by § 533(b) does not fit with its asserted justification.[29]

Defendants attempt to finesse the mismatch between the effect of § 533(b) and its asserted justifi-

[29] Defendants have advanced the cross-subsidy argument with greater vigor than the pole access argument. This is understandable, for there is substantial disagreement in the record concerning the potential effectiveness of regulatory controls on cross-subsidization, but there is no doubt that, to the extent that the existing Pole Attachment Act does not entirely prevent the possibility of pole access discrimination, effective legislation could be passed to guarantee non-discriminatory access. If discriminatory pole access were the sole concern of Congress in enacting a prophylactic ban on a telephone company's ability to speak through video programming, then such a ban would plainly burden more speech than necessary to further the government's interests.



cation by submitting an affidavit by Bruce M. Owen, former Chief Economist of the Antitrust Division of the United States Department of Justice. In his affidavit, Owen concedes that the telephone companies are already in a position to cross-subsidize video transmission service. But he goes on to argue that:

> telephone companies' incentive to engage in that cross-subsidization is greatly enhanced if telephone companies are also allowed to exploit monopoly control of video transmission by earning excess profits in video programming. Simply put, the removal of § 533(b) would make a video transmission monopoly more valuable to a telephone company.

Reply Affidavit of Bruce M. Owen at 2-3.[30] As is apparent from Owen's affidavit, it is the concern that telephone companies will act anti-competitively in the *video programming* market, not the *video transport* market, that ultimately must provide the justification for § 533(b). Yet all the evidence adduced regarding the difficulty of regulating anti-competitive conduct of the telephone companies relates to difficulties in monitoring their conduct in the video transport business.[31] There is no contention that the telephone

[30] *See also* FNOI, 3 FCC Rcd. at 5864 ("Barring carriers from providing video programming in the service areas in which they also control the local exchange networks and facilities on which the delivery of cable programming provided by third parties generally depends surely reduces carrier incentive and ability to engage in anticompetitive conduct in those service areas.").

[31] *See, e.g.*, Owen Affidavit at 15 ("Local telephone companies have a substantial opportunity to engage in cross-subsidization when, as here, both the competitive video trans-

companies possess any inherent advantage that would allow them successfully to evade regulation of anti-competitive behavior in the video programming market.[32] Even under the government's worst case scenario, in which the telephone companies succeed in driving out all competition for the provision of video transport service, the telephone companies would be in no better position to act anti-competitively in the video programming market than are the current monopolists in the video transport market, the existing cable operators.

In fact, the potential for telephone companies to act anti-competitively in the video programming market can be reduced to a level significantly below the level of risk currently tolerated in relation to the

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mission service and the monopoly service are provided on common facilities with common costs. . . . Common costs mean that cross-subsidization is virtually impossible to detect and eliminate. It is the existence of significant common costs which differentiates telephone companies from [other potentially anti-competitive actors]."); OPP Report at 157 ("One of the most difficult aspects of telephone regulation is the assignment of costs to their causes. Cable and telephone systems share a certain amount of capital equipment; allocating share costs between these capital accounts on the basis of actual cost causation will be difficult or impossible.") (footnotes omitted).

[32] *See* Reply Affidavit of Alfred E. Kahn, Professor Emeritus of Political Economy, Cornell University, at 3-4 ("It is difficult to conceive that there could be any substantial costs common to the transmission of video and other telephone signals, on the one side, and the creation and packaging of video programming on the other. . . . There is therefore no rational connection between the defendants' cross-subsidy argument and the ban against telephone companies providing video *programming*.").



cable operators. To the extent that the existing legislative and regulatory framework may be viewed as ineffective in curbing anti-competitive actions in the video programming market, more restrictive conditions may be placed on the provision of video programming by telephone companies. For example, the Commission's current recommendation to Congress for repeal of § 533(b) includes a requirement limiting the telephone company's direct provision of video programming to a specified percentage of the channel capacity made available by the company's video transport facilities. Video Dialtone Order, 7 FCC Rcd. at 5850. The balance of the channel capacity would be required to be leased on a common carrier basis, and the system would be required to have the capability to accommodate multiple video programmers. *Id.* Such restrictions would eliminate any possibility that a telephone company could extract monopoly profits from the video programming market (even if it succeeded in monopolizing the video transport market) by artificially restricting the aggregate quantity of video programming, thereby inflating the market share of the telephone company's programming affiliate. *See also* Communications Competitiveness and Infrastructure Modernization Act of 1991, S. 1200, H.R. 2546, 102d Cong., 1st Sess., § 653 (1991) (proposing repeal of § 533(b) and 25% capacity limit upon local telephone company provision of video programming).[33]

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[33] The variety of conceivable measures that would effectively eliminate the potential for a telephone company to exercise market power in the video programming market drives home the point that there is not merely "some imaginable alternative" to § 533(b) "that might be less burdensome on

In sum, this Court need not determine whether the Commission is correct in its assertion that its "existing safeguards . . . are sufficient at this time to protect against cross-subsidization. . . ." Video Dialtone Order, 7 FCC Rcd. at 5828. The Court accepts, *arguendo*, the proposition that cross-subsidization is uncontrollable by means of regulatory oversight.[34]

speech," but rather an entire range of effective alternatives that would burden substantially less speech than § 533(b). *C.f. United States* v. *Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906-07, 86 L.Ed.2d 536 (1985).

[34] A considerable portion of the voluminous record in this case is devoted to the issue of whether cross-subsidization could effectively be eliminated by the scrutiny of the responsible regulatory agencies. Developments such as the expanded use of "price cap" rate regulation of the telephone companies and the Commission's increasing experience in formulating and implementing separation safeguards, *see, e.g. In re Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 7 FCC Rcd. 7571 (1991), indicate that the regulatory environment is vastly changed since Congress' enactment of the 1984 Cable Act, with the prospects for effective regulatory oversight significantly improved. Yet, the Court cannot, on this record, confidently conclude that changes in the methods of regulation have absolutely eliminated the risk of cross-subsidization. Even the Commission, in recommending the repeal of § 533(b), found, not that cross-subsidization has been rendered impossible, but rather that "any remaining risk of anticompetitive conduct by the local telephone companies is *outweighed* by the potential public interest benefits their entry would bring." Video Dialtone Order, 7 FCC Rcd. at 5849 (emphasis added). Fortunately, in the final analysis the Court need not reach the issue of the potential effectiveness of the regulatory measures, because of § 533(b)'s essential irrelevance with respect to the prevention of cross-subsidization or, in fact, to the prevention of any anti-competitive conduct in the video transport market.



The essential point is that telephone companies may already, under existing law, compete in the video transport market, and if it were possible for them to reap supra-competitive profits in that market through cross-subsidization, the telephone companies could do so irrespective of § 533(b). The only argument defendants can advance to give relevance to § 533(b) as a deterrent of anti-competitive behavior is to contend that the prospect of additional supra-competitive profits from the video programming market may give the telephone companies the needed additional incentive to monopolize the video transport market. This argument fails because there is neither evidence in the record nor any convincing argument to suggest that standard methods of regulation would be ineffective to control anti-competitive activities by the telephone companies in the video programming market. Telephone companies enter the *video programming* market, unlike the *video transport* market, with no inherent advantage that would enable them to evade effective regulation. The federal agencies charged with enforcement of the antitrust laws stand ready to guard against anti-competitive behavior in the video programming market, just as in any other industry.

In light of the fact that effective alternatives exist that would allow telephone companies to enter the cable television market, yet prevent the evils allegedly targeted by § 533(b), the Court finds that § 533 (b) is not "narrowly tailored to serve a significant governmental interest," but instead, that the statute "burden[s] substantially more speech than is necessary to further the government's legitimate inter-

ests." The statute therefore fails the test articulated by the Supreme Court in *United States v. O'Brien.*[35]

V.

For the foregoing reasons, § 533(b) is facially unconstitutional as a violation of plaintiffs' First Amendment right to free expression.[36] An appropriate Order, enjoining enforcement of § 533(b), will issue.

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[35] Obviously, if the Court's analysis regarding the appropriate standard of review is flawed, and § 533(b) is properly subject to strict scrutiny, then the provision would fail the "narrowly drawn" element of that test as well. *See Ward,* 491 U.S. at 798 n. 6, 109 S.Ct. at 2758 n. 6. Section 533(b) would also fail strict scrutiny for the independent reason that preservation of diversity in the ownership of communications media is not a sufficiently "compelling state interest" to provide justification for a content-based restriction on speech. *C.f. Burson,* —— U.S. at ——-——, 112 S.Ct. at 1857-58 (state's interest in preserving the "fundamental right . . . to cast a ballot in an election free from the taint of intimidation and fraud" makes *Burson* "the rare case in which we have held that a law survives strict scrutiny").

[36] There is no materially significant fact specific to the provision of cable television in the City of Alexandria, which would serve to distinguish this case from any other projected application of § 533(b). Accordingly, the Court determines that § 533(b) "could never be applied in a valid manner," and thus that plaintiffs have properly brought a facial challenge to the statute. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 796-801, 104 S.Ct. 2118, 2124-27, 80 L.Ed.2d 772 (1984). Obviously, plaintiffs' "as applied" challenge succeeds for the identical reasons.



**APPENDIX C**

[Filed Jan. 18, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 93-2340

CA-92-1751-A

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY; BELL ATLANTIC VIDEO SERVICES COMPANY; BELL ATLANTIC CORPORATION; CHESAPEAKE & POTOMAC TELEPHONE COMPANY; C & P TELEPHONE COMPANY OF MARYLAND; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA; THE DIAMOND STATE TELEPHONE COMPANY; THE BELL TELEPHONE COMPANY OF PENNSYLVANIA; NEW JERSEY BELL TELEPHONE COMPANY, PLAINTIFFS-APPELLEES

*v.*

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, in her official capacity as Attorney General of the United States, DEFENDANTS-APPELLANTS

and

THE NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, DEFENDANT

CONSUMER FEDERATION OF AMERICA; VIRGINIA CITIZENS CONSUMER COUNCIL; NEWSPAPER ASSOCIATION OF AMERICA; VIRGINIA PRESS ASSOCIATION; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIA-

TION; METS FANS UNITED/VIRGINIA CONSUMERS FOR CABLE CHOICE, ET AL.; CITIZENS FOR A SOUND ECONOMY FOUNDATION; THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL; THE COMPETITIVE ENTERPRISE INSTITUTE; THE UNITED STATES TELEPHONE ASSOCIATION; AMERITECH CORPORATION; BELLSOUTH CORPORATION; GTE SERVICE CORPORATION on behalf of its affiliated domestic operating companies; NYNEX CORPORATION; PACIFIC TELESIS GROUP; ROCHESTER TELEPHONE CORPORATION; SOUTHWEST BELL CORPORATION; U S WEST INCORPORATED; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, FIBER OPTICS DIVISION, AMICI CURIAE

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No. 93-2341

CA-92-1751-A

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA; BELL ATLANTIC CORPORATION; BELL ATLANTIC CORPORATION ; BELL ATLANTIC VIDEO SERVICES COMPANY; CHESAPEAKE AND POTOMAC TELEPHONE COMPANY; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA; THE DIAMOND STATE TELEPHONE COMPANY; THE BELL TELEPHONE COMPANY OF PENNSYLVANIA; NEW JERSEY BELL TELEPHONE COMPANY, PLAINTIFFS-APPELLEES

*v.*

THE NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, DEFENDANT-APPELLANT

and



UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, in her official capacity as Attorney General of the United States, DEFENDANTS

CONSUMER FEDERATION OF AMERICA; VIRGINIA CITIZENS CONSUMER COUNCIL; NEWSPAPER ASSOCIATION OF AMERICA; VIRGINIA PRESS ASSOCIATION; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; METS FANS UNITED/VIRGINIA CONSUMERS FOR CABLE CHOICE, ET AL.; CITIZENS FOR A SOUND ECONOMY FOUNDATION; THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL; THE COMPETITIVE ENTERPRISE INSTITUTE; THE UNITED STATES TELEPHONE ASSOCIATION; AMERITECH CORPORATION; BELLSOUTH CORPORATION; GTE SERVICE CORPORATION on behalf of its affiliated domestic operating companies; NYNEX CORPORATION; PACIFIC TELESIS GROUP; ROCHESTER TELEPHONE CORPORATION; SOUTHWEST BELL CORPORATION; U S WEST INCORPORATED; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, FIBER OPTICS DIVISION, AMICI CURIAE

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ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

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The governmental appellants' and National Cable Television Association's petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk



**APPENDIX D**

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 95-20

CC Docket No. 87-266

IN THE MATTER OF
TELEPHONE COMPANY-CABLE TELEVISION
Cross-Ownership Rules, Sections 63.54-63.58

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FOURTH FURTHER NOTICE OF
PROPOSED RULEMAKING

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Adopted: January 12, 1995

Released: January 20, 1995

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Comment Date: March 6, 1995
Reply Comment Date: March 21, 1995

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By the Commission: Commissioners Barrett, Ness, and Chong issuing separate statements.

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## I. INTRODUCTION

1. In recent years, we have adopted a series of orders to permit telephone companies to play a broader role in the video marketplace.[1] The "video dialtone" framework we established in these orders was designed to be consistent with the cross-ownership restrictions imposed by the Cable Communications Policy Act of 1984 (1984 Cable Act).[2] The telco-cable cross-ownership ban prohibits telephone companies from providing video programming directly to subscribers in their telephone service areas.

2. The United States Courts of Appeals for the Fourth and Ninth Circuits recently ruled that the 1984 Cable Act's cross-ownership restriction violates

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[1] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (*First Report and Order*), *aff'd*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) (*Memorandum Opinion and Order on Reconsideration*), *aff'd*, *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) (*NCTA v. FCC (1994)*); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Second Report and Order*), *aff'd*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994) (*Video Dialtone Reconsideration Order*), *appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

[2] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779 (codified at 47 U.S.C. § 533 (b)) ("telco-cable cross-ownership ban or restriction").



the First Amendment rights of telephone companies.[3] United States District Courts in three other circuits have also reached the same conclusion.[4] We issue this Fourth Further Notice of Proposed Rulemaking to consider changes in our video dialtone rules and policies in light of these decisions, and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities. We intend through this notice to consider rules and policies to govern the provision of video programming over video dialtone facilities by telephone companies not subject to the 1984 Cable Act cross-ownership restriction. To the extent a telephone company remains subject to the ban, our existing video dialtone framework will continue to apply. We also seek comment on certain related issues.

## II. BACKGROUND

3. The telco-cable cross-ownership restriction has its roots in a Commission rule adopted in 1970. At that time, the cable television industry was in its infancy, and the Commission was concerned that, if

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[3] *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, No. 93-2340 (4th Cir. Nov. 21, 1994) (*C&P Tel. Co. v. U.S.*); *U S West, Inc. v. United States*, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. December 30, 1994) (*U S West v. U.S.*).

[4] *BellSouth Corp. v. United States*, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994) (*BellSouth v. U.S.*); *Ameritech Corp. v. United States*, 867 F.Supp. 721 (N.D. Ill. 1994); (*Ameritech v. U.S.*) *NYNEX Corp. v. United States*, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994) (*NYNEX v. U.S.*).

permitted to offer cable television services in their telephone service areas, telephone companies would be able to monopolize this emerging industry. In the 1984 Cable Act, Congress enacted a provision modeled after the Commission's cross-ownership restriction. The new statutory ban prohibited telephone companies from providing video programming directly to subscribers in their telephone service areas.[5] "Video programming" was defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." [6] The legislation also included a rural exemption and waiver authority for the Commission.[7]

4. In 1991, the Commission proposed to amend its telco-cable cross-ownership rules to permit local exchange carriers (LECs) to play a broader role in the video marketplace, consistent with the 1984 Cable Act.[8] Specifically, the Commission proposed to permit LECs to provide video dialtone service, which it described as "an enriched version of video common carriage under which LECs will offer various non-programming services in addition to the underlying video transport." [9] The Commission concluded that LECs offering video dialtone service would not need a cable franchise under Section 621(b) of the 1984 Cable Act because (1) video dialtone service is not "cable service" as defined in the 1984 Cable Act and (2) LECs are not "cable operators" as defined in that

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[5] *See* 47 U.S.C. § 533(b)(1).

[6] 47 U.S.C. § 522(19).

[7] *Id.* § 533(b)(3), (b)(4).

[8] *See First Report and Order*, 7 FCC Rcd 300.

[9] *Id.* at 306, para. 10.



Act.[10] In addition, the Commission determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act.[11] The Commission's video dialtone-franchise decisions have been upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *NCTA v. FCC (1994)*.[12]

5. In 1992, the Commission adopted the video dialtone proposal outlined in its 1991 Notice.[13] Under video dialtone, LECs may offer, on a nondiscriminatory basis, a basic common carrier video delivery platform capable of accommodating multiple video programmers.[14] This "first level platform" is subject to regulation under Title II of the Communications Act. LECs may also offer enhanced and other non-regulated services provided they comply with existing regulatory safeguards.[15] LECs proposing to con-

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[10] Section 621(b)(1) provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1).

[11] *First Report and Order*, 7 FCC Rcd at 327-28, para. 52.

[12] *NCTA v. FCC (1994)*, 33 F.3d 66.

[13] *See generally, Second Report and Order*, 7 FCC Rcd 5781.

[14] *Second Report and Order*, 7 FCC Rcd at 5797, para. 29.

[15] *Id.* at 5811, para. 58, 5828, para. 92. These safeguards include accounting and cost allocation rules to separate the costs of providing enhanced and other non-regulated services from the costs of providing regulated services, as well as network disclosure rules to ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment with the network. In addition, we held that the Bell Operating Companies (BOCs) and GTE Services Corporation (GTE)

struct video dialtone facilities must first obtain approval under Section 214 of the Communications Act of 1934, as amended (the Act).[16]

6. Consistent with the 1984 Cable Act's cross-ownership restriction, the Commission prohibited LECs offering video dialtone service from providing video programming directly to subscribers in their telephone service areas, either through the telephone operating company or through an affiliate.[17] A LEC would be deemed to "provide" video programming if it determined how video programming is presented for sale to subscribers, including making decisions concerning the bundling, or "tiering" of the programming or the price, terms, or conditions on which the programming is offered to subscribers.[18] In addition,

must adhere to Open Network Architecture (ONA) requirements and other safeguards adopted in the *BOC Safeguards Order*, including rules governing the use of customer proprietary network information. *See infra* note 70.

[16] *Second Report and Order* at 5820, para. 72; *see* 47 U.S.C. § 214(a).

[17] The Commission adopted detailed ownership and non-ownership affiliation rules to implement this requirement. These rules are set forth at 47 C.F.R. § 63.54. The Commission is currently considering changes to its ownership attribution rules in various other contexts. *See* Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51, and 87-154, FCC No. 94-324 (released January 12, 1995). We ask for comment on what impact, if any, any such changes in other contexts might have here.

[18] *Second Report and Order* at 5817, para. 69; *Video Dialtone Reconsideration Order* at para. 64.



LECs were precluded from holding an ownership interest of 5 percent or more in a video programmer that offers service in a LEC's telephone service area.[19] At the same time, however, we recommended that Congress amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide video programming directly to subscribers in their telephone service areas.[20] We stated that if Congress repealed the ban, we would consider imposing certain safeguards on LECs providing video programming directly to subscribers. These safeguards included: a structural separation requirement; a requirement that the LEC's video programming services be provided through the video dialtone platform that provides service to multiple video programmers; and a limit on the percentage of overall platform capacity a LEC could use to transmit its own programming.[21]

7. In October 1994, we affirmed the basic video dialtone framework, while modifying our specific video dialtone rules and policies in various respects.[22] We also affirmed and reiterated our recommendation that Congress repeal the 1984 Cable Act cross-ownership ban. We stated that "[g]iven the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly."[23] We noted that while there re-

[19] *Second Report and Order* at 5801, 5819, paras. 36, 71; *see Video Dialtone Reconsideration Order* at paras. 64-70.

[20] *Second Report and Order*, 7 FCC Rcd at 5847, para. 135.

[21] *Id.* at 5847-48, para. 135.

[22] *See Video Dialtone Reconsideration Order*, *supra* note 1.

[23] *Video Dialtone Reconsideration Order* at para. 265.

mains some risk of anticompetitive behavior by LECs, this risk can and should be addressed through our video dialtone framework and other appropriate regulatory safeguards.[24] We did not comment on the need for any particular safeguards, indicating instead that we would address these issues in a subsequent proceeding.

8. Congress has not repealed the telco-cable cross-ownership restriction. Several federal courts have, however, declared the ban unconstitutional as a violation of the First Amendment.[25] The Fourth Circuit, for example, determined that the cross-ownership ban violates the free speech clause because it is not "narrowly tailored to serve a significant government interest" and does not make ample alternative methods of communication available that are "sufficiently similar to the method foreclosed by the regulation." [26]

## III. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

### A. Governing Statutory Provisions

9. LEC provision of video programming raises questions about whether Title II, Title VI, or both, would govern particular LEC video offerings, and

[24] *Id.*

[25] *See C&P Tel. Co. v. U.S., U S West v. U.S., BellSouth v. U.S., Ameritech v. U.S.*, and *NYNEX v. U.S., supra* notes 3 and 4.

[26] *C&P Tel. Co. v. U.S.*, No. 93-2340, slip op. at 31, 40 (citations omitted). The Ninth Circuit also found the provision was not "narrowly tailored," but declined to reach the issue of the availability of "ample alternative channels of communications." *U S West v. U.S.* slip op. at 15913.



how these provisions might apply to a LEC's provision of video programming directly to subscribers within its telephone service area and over facilities used to provide both voice and video services. We now seek comment on these issues and on the analysis we offer below.[27]

#### 1. *Application of Title II to LEC Video Programming Offerings*

10. We first tentatively conclude that telephone companies should be permitted to provide video programming over Title II video dialtone platforms. We recently reaffirmed our conclusion that the construction of video dialtone systems would serve the public interest goals of facilitating competition in the provision of video programming services, encouraging efficient investment in our national information infrastructure, and fostering the availability to the American public of new and diverse sources of video programming.[28] Two U.S. Courts of Appeals have now held unconstitutional the specific statutory basis

[27] We recognize the existence and importance of a number of other policy and legal issues beyond those raised in this Notice. In general, we note that the entry of telephone companies into the provision of video programming also raises questions regarding the impact of our regulation on the ability of cable operators to respond to the deployment of video dialtone, as well as broader issues regarding potential regulatory disparities among video dialtone providers, cable operators, and other multichannel video programmers. Our decision to issue this Notice to address the specific questions arising directly from the recent court decisions is not intended to foreclose future consideration elsewhere of these broader issues.

[28] *Video Dialtone Reconsideration Order* at para. 3.

for prohibiting a telephone company from providing, directly or indirectly, programming over its own video dialtone platform.[29] In light of the public interest benefits of a video dialtone platform, which provides multiple video programmers with common carrier-based access to end users, we tentatively conclude, in the absence of Section 533(b), that we should not ban telephone companies from providing their own video programming over their video dialtone platforms. We note that we allow telephone companies to use their networks to provide their own enhanced services today, subject to safeguards. Thus, in the absence of a demonstration of a significant governmental interest to the contrary, we propose to allow telephone companies to provide video programming over their own video dialtone platforms, subject to appropriate safeguards. We seek comment on this proposal, and on whether any such significant governmental interest to support a ban exists and, if it does, whether a ban would be a narrowly tailored restriction on the telephone companies' First Amendment rights.

11. A second Title II issue is whether we can, and should, require telephone companies to provide video programming only over video dialtone platforms. Even before the recent court decisions invalidating the telco-cable cross-ownership ban, there were three circumstances in which LECs could provide video programming directly to subscribers. Within their telephone service areas, LECs have been permitted to provide video programming in areas covered by the rural exemption to the telco-cable cross-

[29] *See generally, C&P Tel. Co. v. U.S.* and *U S West v. U.S. supra* note 3.



ownership ban, or if they received a waiver of Sections 613(b)(1) or (b)(2).[30] In both these situations, we have required LECs to obtain authorization under Section 214 of the Communications Act before constructing facilities.[31] In addition, outside their telephone service area, LECs have been able to purchase an existing cable system or apply for a franchise to construct a new cable system.[32] A LEC is

[30] *See* 47 U.S.C. §§ 533(b)(3), (b)(4); 47 C.F.R. §§ 63.56, 63.58. Section 613(b)(4) authorizes the Commission to waive the cross-ownership prohibition under either of two independent criteria. First, the Commission may waive the restriction when it determines that "the provision of video programming directly to subscribers through a cable system demonstrably could not exist [within the LEC's telephone service area] except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved." 47 U.S.C. § 533(b(4). Alternatively, the Commission may grant a waiver upon other showing of good cause. *Id.* The Commission has exercised its authority to grant waivers of the cross-ownership ban in certain circumstances. *See* Time Warner Entertainment Co., L.P. and U S WEST Communications, Inc., 8 FCC Rcd 7106 (1993) (granting temporary waiver of prohibition upon demonstration of good cause to permit divestiture of cable systems after a merger); General Tel. Co. of California, 4 FCC Rcd 5693 (1989) (good cause waiver to permit telephone company involvement in cable television experiment), *remanded*, *NCTA v. FCC*, 914 F.2d 285, 287 (1990) (*NCTA v. FCC (1990)*), *waiver rescinded on remand*, 8 FCC Rcd 8178 (1993), *aff'd sub nom. GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994) (*GTE California v. FCC*), *petition for rehearing pending*; Shenandoah Tel. Co., 84 FCC 2d 371 (1981) (granting waiver for good cause based on small size and rural nature of areas in question).

[31] 47 U.S.C. § 214(a).

[32] For example, SBC Communications, Inc., a holding company that owns a Bell Operating Company providing local

not required to apply for Section 214 authorization if it is constructing facilities for the provision of cable service outside of its telephone service area.[33] In all these instances, there was a video programming offering that was treated as a traditional cable offering requiring a franchise under Title VI.

12. In these circumstances, however, LECs have not been authorized to use their local exchange facilities to provide cable service, but, rather, to construct or purchase interests in separate cable facilities. Indeed, as noted by the court in *NCTA v. FCC (1994)*, it was not until after the 1984 Cable Act that technological advances have made it practical to deliver video signals over the same common carrier networks that are used to provide telephone service.[34] Previously, as the court noted, "[a] telephone company that wanted to provide cable service would have had to construct a coaxial cable distribution system parallel to its telephone system."[35]

13. We seek comment on whether we have authority under Section 214 to require LECs that seek to provide video programming directly to subscribers in their telephone service areas to do so on a video dial-

exchange and exchange access telephone services in the southwestern United States, purchased two cable systems in the metropolitan Washington, D.C. area from Hauser Communications, Inc. in early 1994. U S WEST, Inc. also recently completed its acquisition of cable systems in the Atlanta, Georgia area, which is outside of its LEC's telephone service area. In both these examples, the LEC holds a cable franchise pursuant to Section 621 from the local franchising authority.

[33] 47 C.F.R. § 63.08(a).

[34] *NCTA v. FCC (1994)*, 33 F.3d at 69.

[35] *Id.*



tone common carrier platform and not on a non-common carrier cable television facility. We seek comment on what circumstance would warrant such a requirement, and specifically on whether we should require use of a video dialtone platform whenever a LEC provides video services over facilities that are also used in the provision of telephone services. We seek comment on our authority generally to require LECs seeking Section 214 authority to acquire or construct video facilities to comply with our video dialtone framework.[36]

2. *Application of Title VI to LEC Provision of Video Programming*

14. We now seek comment on the circumstances, if any, in which a LEC that, by court decision, is not subject to the 1984 Cable Act telco-cable cross-ownership ban may offer a cable service subject to Title VI in lieu of a Title II video dialtone offering. We also seek comment on the extent to which Title VI should apply to video programming provided by LECs on a Title II video dialtone system. As noted, we have previously held that LEC provision of a common carrier video dialtone platform is not subject to Title VI of the Act.[37] In particular, we found that such LECs are not offering "cable service," and are not operating a "cable system" within the meaning of Title VI.[38] We reasoned that LECs did not actively

[36] *See* 47 U.S.C. § 214(c).

[37] *First Report and Order*, 7 FCC Rcd at 324, para. 50, *aff'd*, *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd at 5070, para. 11.

[38] *First Report and Order*, 7 FCC Rcd at 326-27, para. 51, *aff'd*, *Memorandum Opinion and Order on Reconsideration*,

participate in the selection and distribution of video programming because they were precluded from providing video programming directly to subscribers in their telephone service areas.[39] We also concluded that video dialtone facilities are not cable systems because they are common carrier facilities subject to Title II of the Act which, under Commission rules, could not be used for LEC provision of video pro-

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7 FCC Rcd at 5071-73, paras. 13-25. The Commission also determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act. *See supra* para. 4.

The 1984 Cable Act defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5). A "cable system" is defined as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . .
>
> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers . . . .

47 U.S.C. § 522(7).

[39] *See Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd at 5071, 5072-73, paras. 16, 24.



gramming directly to subscribers in the LEC's telephone service area.

15. We now seek comment on whether, if a LEC, or its affiliate, does provide video programming over its video dialtone system and actively engages in the selection and distribution of such programming, that LEC, or its affiliate, is subject to Title VI. We seek comment on the Commission's legal authority to determine whether some, but not all, provisions of Title VI relating to cable operators would apply to a LEC that provides video programming over its video dialtone platform. We also seek comment on whether the application of some or all provisions of Title VI would result in a regulatory framework that is duplicative of, or inconsistent with, federal or state regulation of communications common carriage. For example, the goals of the leased access provision of Title VI could be met through obligations Title II imposes on a LEC as the provider of the video dialtone platform whether or not the LEC as a video service provider provides its own leased access channels.[40] We seek comment on the potential impact of our determinations in this proceeding on existing grants by state and local authorities of public rights-of-way. We also invite parties to discuss both the legal and practical implications of requiring, or not requiring, telephone companies providing video programming over their own video dialtone systems to comply with each of the various provisions of Title VI. In the event that Title VI cable rate regulation rules apply, we seek comment on how such rules would apply to a LEC providing video programming directly to subscribers over its own video dialtone platform.

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[40] *See* 47 U.S.C. § 532.

16. In addition, we seek comment on whether, if Title VI does not apply to telephone companies' provision of video programming on video dialtone facilities, the Commission should adopt, under Title II, provisions that are analogous to certain aspects of Title VI. For example, we seek comment on whether we should adopt rules governing program access by competing distributors, carriage agreements between video service providers and unaffiliated programmers, and vertical ownership restrictions.[41]

17. Finally, we note that the court's opinion in *NCTA v. FCC (1994)* is consistent with the Commission's reasoning in the *First Report and Order* that a LEC providing video dialtone service does not require a local franchise because the LEC does not provide the video programming. We seek comment on whether this view would require a LEC offering video dialtone service to secure a local franchise if that LEC also engages in the provision of video programming carried on its platform.

### B. Regulatory Safeguards Governing a Local Exchange Carrier's Provision of Video Programming on its Video Dialtone Platform

#### 1. *Introduction and Scope*

18. In this section we consider what changes, if any, need to be made to our video dialtone regulatory framework if a telephone company, pursuant to an applicable court decision, decides to become a video programmer on its own video dialtone platform in its telephone service area.[42] Our previous decisions estab-

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[41] *See infra* para. 23.

[42] In amendments to its Section 214 applications to provide video dialtone service, Bell Atlantic requested permission



lishing the regulatory framework for video dialtone were premised on the assumption that LECs would not be able to be customer-programmers of their own video dialtone systems. Our purpose herein is to determine whether LEC provision of video programming raises new concerns about anticompetitive behavior or cross-subsidy that our existing regulatory framework and safeguards may not sufficiently address. In addressing the issues identified below, parties should address whether we should apply different safeguards for technical and market trials than for commercial offerings of video dialtone.

#### 2. *Ownership Affiliation Standards*

19. Under our current rules, LECs are prohibited from providing video programming directly to subscribers, and from having a cognizable (*i.e.*, 5 percent or more) financial interest in, or exercising direct or indirect control over, any entity that is deemed to provide video programming in its telephone service area.[43] Although we now propose to

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from the Commission to provide video programming over its own video dialtone systems. *See* Bell Atlantic Telephone Company (Bell Atlantic), File No. W-P-C 6912 (application filed December 16, 1993, amendment filed June 16, 1994), Bell Atlantic, File No. W-P-C 6966 (application filed June 16, 1994). The Commission granted Bell Atlantic's amended application to provide video programming over its video dialtone system in a market trial in Northern Virginia, subject to certain conditions. Bell Atlantic, File No. W-P-C-6834 (released January 20, 1995) (*Bell Atlantic Market Trial Order*).

[43] In the *Video Dialtone Reconsideration Order*, the Commission affirmed, with some modifications and clarifications, its ownership affiliation rules. The Commission upheld its

permit telephone companies to provide video programming over video dialtone platforms, we propose to retain these ownership affiliation standards to identify those video dialtone programmers that we will consider to be affiliated with LECs providing the underlying common carriage. Under this proposal, if the Commission determines that LEC ownership of video programming requires additional safeguards, those safeguards would apply if the LEC owned five percent or more of a video programmer. We seek comment on this proposal.

3. *Safeguards Against Anticompetitive Conduct*

a. *Sufficient Capacity to Serve Multiple Service Providers*

20. Under the video dialtone regulatory framework, a LEC is required to provide sufficient capacity to serve multiple service providers on a nondiscriminatory basis. In the *Video Dialtone Reconsideration Order,* we rejected use of an "anchor programmer," that is, allocation of all or substantially all of the analog capacity of the video dialtone platform to a single programmer.[44] We seek comment on whether there are other across-the-board rules that we should adopt to ensure that video dialtone retains its essential Title II character when a LEC becomes a video programmer on its platform.

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earlier determination that, consistent with the cross-ownership ban, it was impermissible for a LEC to own five percent or more of a video programmer. For purposes of the video dialtone rules, a video programmer was defined as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. *See Video Dialtone Reconsideration Order* at paras. 64-74. *See also supra* para. 6.

[44] *Video Dialtone Reconsideration Order* at para. 35.



21. We seek comment, for instance, on whether we should limit the percentage of its own video dialtone platform capacity that a LEC, or its affiliate, may use. Such a limit could help ensure other programmers access, but may create a risk that some capacity might go unused. We seek comment on what an appropriate limit would be; whether any percentage limit should vary with the platform's capacity; and whether different rules should apply to analog and digital channels.[45] Video dialtone capacity constraints appear likely to be most severe in the short-term, with respect to analog channels, and may be of less concern on future all-digital systems. Commenters should address whether LEC use of video dialtone capacity raises short-term or long-term concerns, and how the probable duration of the problem should affect our regulatory approach. Alternatively, we seek comment on whether LECs that deny capacity to independent programmers should be subject to procedural requirements more detailed than those imposed in the *Video Dialtone Reconsideration Order.*[46]

22. In the Third Further Notice of Proposed Rulemaking (Third Further Notice), the Commission sought comment and information regarding channel sharing mechanisms that LECs have proposed as means of making analog capacity available to more customer-programmers than might otherwise

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[45] We have previously suggested that a 25% capacity limit "strikes a reasonable balance among competing risks and benefits involved." *Second Report and Order*, 7 FCC Rcd at 5850-1 n.360.

[46] *Id.* at para. 38.

authoritatively construed it. Now that the FCC has done so, the courts are obligated to consider the effect of its action; indeed, respondents acknowledge that our "arguments about the implications of the *Third Report and Order* can be considered in due course on the merits." Resp. 3. This Court, of course, can undertake to decide in the first instance whether the Third Report and Order is a valid interpretation of the FCC's waiver authority, and, if so, whether the statute's operation in combination with that waiver authority is constitutional. The more prudent course, however, would be to give the court of appeals an opportunity to pass on those matters first.[4]

3. Respondents argue (Resp. 20-24) that the FCC's Third Report and Order should not be taken into consideration because (in their view) it effectively swallows the entire cross-ownership bar, and

[4] Respondents suggest that those issues could be addressed by the court of appeals even if this Court denies the petition for certiorari. Resp. 3. That suggestion, however, if accepted by the Court, is likely to lead to extensive litigation. If the Court denies certiorari in this case, respondents will presumably challenge any conditions imposed by the FCC on LEC participation in cable and video dialtone as lacking a statutory basis, since the lower courts have enjoined enforcement of 47 U.S.C. 533(b). The FCC may impose conditions on LEC participation under 47 U.S.C. 214(a), which requires FCC approval for the operation of a new service by a common carrier, and indeed, in 1970, the FCC imposed the initial cross-ownership restrictions under the authority of that statute. See *In re Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co. of Southwest* v. *United States*, 449 F.2d 846, 854 (5th Cir. 1971).



does nothing to alleviate the constitutional flaw of the bar. Both contentions are incorrect. The FCC does not intend to "eliminat[e] [the bar] for the entire local telephone industry on a 'routine[]' basis" (Resp. 21). The FCC intends to allow participation by LECs in the video programming market in their service areas when doing so would advance the competitive and free-speech interests of Section 533(b). Thus, the FCC will not allow LECs to purchase incumbent monopolist cable operators in their service areas, since that would not promote competition and would only extend the LECs' monopoly position to the cable market. Supp. Br. App. 16a. Allowing LEC participation in the new technology of video dialtone, by contrast, will promote competition with local cable operators and will expand outlets for communication in local communities. *Id.* at 16a-17a.

Nor is the FCC's exercise of its waiver authority at all comparable to the threat to free speech posed by waiver or licensing schemes like those reviewed by the Court in *Forsyth County* v. *Nationalist Movement*, 112 S. Ct. 2395 (1992), and similar cases (see Resp. 23-24). The FCC's exercise of its waiver authority will not be content-based; it will be made pursuant to rules published in advance for all to know; and it will be subject to all the usual substantive and procedural constraints governing the FCC's exercise of its authority. The FCC has not yet established, finally and in full detail, all of the conditions governing LEC participation in video dialtone because the accounting and structural safeguards necessary to protect against anti-competitive abuse by respondents and other LECs are decidedly complex and are still being developed by the FCC.

4. Finally, we note that respondents do not contest that the court of appeals' rationale for its decision is undermined by a waiver policy that allows LECs to offer even a limited number of channels of video programming to common carrier subscribers on a video dialtone system. Since the Third Report and Order makes available to LECs substantial opportunities to participate in the provision of video programming to common carrier subscribers, Section 533(b) does not "burden substantially more speech than is necessary to further the government's legitimate interests," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989), and "leave[s] open ample alternative channels of communication," *id.* at 802. While respondents have made several arguments why the Third Report and Order should not be given effect, those arguments can be considered by the court of appeals on remand.

* * * * *

For the foregoing reasons, and for the reasons set forth in the petition and the supplemental brief in support of the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of the FCC's Third Report and Order.

Respectfully submitted.

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